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MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1974

No. 73-2025

JUNIOR CHAMBER OF COMMERCE OF ROCHESTER, INC.; JANIS GAINES, individually, and on behalf of all other persons similarly situated; JANE SELMAN, individually, and on behalf of all other persons similarly situated; CHARLES WETMORE, individually, and on behalf of all other persons similarly situated; JAMES T. BRUEN, individually, and on behalf of all other persons similarly situated; DAVID HEILIGMAN, individually, and on behalf of all other persons similarly situated; THOMAS BANASZEWSKI, individually, and on behalf of all other persons similarly situated; JOANN CLEVENGER, individually, and on behalf of all other persons similarly situated; SYDNEE SCHWARTZ, individually, and on behalf of all other persons similarly situated.

Petitioners,

vs.

THE UNITED STATES JAYCEES; THE NEW YORK STATE JAYCEES; THE UNITED STATES JAYCEES FOUNDATION; THE JAYCEES MENTAL HEALTH AND MENTAL RETARDATION FUND; THE JAYCEES WAR MEMORIAL FUND; PENNSYLVANIA STATE JAYCEES; LOUISIANA JUNIOR CHAMBER OF COMMERCE, INC.; DOWNTOWN CHAPTER OF THE DISTRICT OF COLUMBIA JAYCEES; MAINE STATE JAYCEES; JUNIOR CHAMBER OF COMMERCE OF ORRINGTON, INC.; GEORGE P. SHULTZ, as Secretary of the Treasury of the United States; DON ALEXANDER, as Commissioner of Internal Revenue; THE INTERNAL REVENUE SERVICE OF THE DEPARTMENT OF THE TREASURY OF THE UNITED STATES; HOWARD PHILLIPS, Acting Director of the Office of Economic Opportunity; JAMES LYNN, as Secretary of the Department of Housing and Urban Development; PETER J. BRENNAN, as Secretary of the Department of Labor; WILLIAM D. RUCKELSHAUS, as Administrator of the Environmental Protection Agency,

Respondents.

—over —

Daily Record Corporation
Rochester, New York
(501)

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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The Petitioners, Junior Chamber of Commerce of Rochester, Inc.; Janis Gaines; Jane Selman; Charles Wetmore; James T. Bruen; David Heiligman; Thomas Banaszewski; Joann Clevenger and Sydnee Schwartz, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this case on April 16, 1974.

Opinions Below

The opinion of the Court of Appeals, not yet reported, appears as Appendix A hereto. Appendix B is the unreported memorandum decision of the United States District Court for the Northern District of Oklahoma.

Jurisdiction

The judgment of the Court of Appeals for the Tenth Circuit was entered on April 16, 1974. This petition for certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254 (1).

Questions Presented

1. Whether the federal government can, consistent with the dictates of the United States Constitution's Equal Protection clause and the statutory provisions establishing the national policy to end sex discrimination, furnish the critical financial support to the United States Jaycee organization which excludes women from membership solely on the basis of sex.

2. Whether the United States Jaycees can lawfully exclude women from membership solely on the basis of sex in view of the financial partnership existing between its organization and federal, state and local governments.

Constitutional and Statutory Provisions Involved

United States Constitution — Fifth Amendment: "No person shall be . . . deprived of life, liberty, or property without due process of law . . ."

United States Constitution — Fourteenth Amendment: ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

42 U.S.C. §1983: "Every person who, under cover of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or a ny other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit and equity, or other proper proceeding for redress."

Statement of the Case

This is a petition to review the judgment and order of the Tenth Circuit Court of Appeals which affirmed the order of the United States District Court, Northern District, Oklahoma, dismissing plaintiffs' complaint and amended complaint for failure to state a claim upon motion of the government official defendants.

In the fall of 1971, females applied for membership in the Junior Chamber of Commerce of Rochester, Inc. (hereafter, Rochester Jaycees), at that time an affiliate in good standing and the second largest affiliate of the United States Jaycees. The constitution and bylaws of the Rochester Jaycees, consistent with the bylaws of the United States Jaycees and the organization's state and local affiliates, provided for membership only to males between the ages of 21 and 36.

Following the submission of the female applications, the Rochester Jaycees undertook a study of its exclusionary membership policies. The organization membership thereafter voted, in January of 1972, to change the chapter bylaws to provide for admission of males and females to the chapter on an equal basis, concluding that exclusion of females from membership solely on the basis of sex is neither lawful, constitutional nor moral.

As the Rochester Jaycees considered the legality, constitutionality and morality of excluding women from the leadership, business and government service opportunities afforded by organization membership, the United States Jaycee organization was informed of the Rochester Jaycee position. The United States Jaycee organization cautioned the Rochester Jaycees that the organization was "not ready" for admission of women on an equal basis with men. Immediately upon the Rochester Jaycees changing its constitution and bylaws to admit women on an equal basis with men, the United States Jaycees notified the Rochester Jaycees of the suspension of its charter

because of the admission of women. Thereafter, on April 25, 1972, the United States Jaycees, through its state affiliate, New York State Jaycees, caused the Rochester Jaycees to be expelled formally from the Jaycee organization because in admitting women to membership on an equal basis with men, the Rochester Jaycees had taken action inconsistent with the bylaws of the United States Jaycees and action "prejudicial to the best interests of the corporation."

After receiving information from the United States Jaycees that it would take action to interfere with the Rochester Jaycees' operations, the Rochester Jaycees and certain of its male and female members, on October 12, 1972, filed this class action lawsuit for declaratory judgment, injunctive relief and damages in the United States District Court for the District of Columbia.[1] Federal jurisdiction is invoked pursuant to 28 U.S.C. §§ 1331, 1340, 1343, 1361, 2201 and 2202. A three judge court is requested.

The plaintiffs claim that the federal government official defendants directly foster sex discrimination, and thereby violate the Equal Protection clause of the Fifth and Fourteenth Amendments to the United States Constitution by furnishing multimillion dollar grants in aid, contracts, financial assistance and tax benefits to the Jaycee organization. These federal funds and benefits constitute major monetary support for the Jaycee organization without which it could not sustain its present programs. Further, the plaintiffs claim that the financial partnership between the government official defendants and the Jaycee defendants violates the national policy to end sex discrimination and that the underwriting of sex discrimination by the government official defendants is beyond the delegated powers of the government official defendants or that the

[1] The case was transferred by order of February 7, 1973 to the United States District Court for the Northern District of Oklahoma following a mandamus proceeding brought by the United States Jaycee defendants from an order of United States District Court Judge George Hart transferring the case to the United States District Court for the Western District of New York. The Jaycee defendants claimed that the interest of justice and the convenience of the parties would be served by the transfer since their documents and witnesses were located in Tulsa, Oklahoma.

government official defendants are exercising unconstitutional powers. The government official defendants in maintaining a financial partnership with Jaycee defendants have placed the stamp of "government approval" on the Jaycee defendants; the Jaycee defendants, by virtue of their critical dependence on government monies for the performance of their social improvement, governmental functions, are infected with state action and therefore cannot lawfully or constitutionally exclude females from membership.

The United States Jaycees is a non-profit corporation, the purpose of which is to engage in community service activities and provide opportunities for young men to obtain leadership training through participation in its programs. The United States Jaycees is an umbrella organization which has affiliated state chapters and numerous local chapters all of which are obliged to comply with the bylaws of the United States Jaycees or face expulsion from the national organization. The bylaws limit membership to males.

The United States Jaycee organization consists of a least 300,000 male members in some 6,000 local chapters across the United States in some 51 state affiliates in each of the 50 states and the District of Columbia. The motto of the organization is to develop the leadership abilities of its all male membership. This program is accomplished by the Jaycee membership performing social improvement work of a governmental nature with the assistance of and in cooperation with city, state and national governments.

The Jaycee organization rejects any suggestion that it is a private, fraternal or social club. Rather the organization holds itself out as the essential community organization to which any male in the United States between the ages of 18 and 36 ought belong.[2]

[2] After this lawsuit was filed, the Jaycee organization voted to lower the minimum age for membership from 21 to 18 years.

Individual memberships in the Jaycee organization are by and large financed by businesses in the communities of the Jaycee local chapter which extend the membership as a corporate benefit to their promising young personnel. The greater portion of memberships in the Rochester Jaycees, as is characteristic of memberships in Jaycee affiliates across the country, are financed by corporate employers. Corporate and/or business "sponsors" use the Jaycee organization as a leadership training program.

The Jaycee organization considers that its role of developing the leadership potential of its male members is accomplished by contributing the resource of its male membership to perform governmental functions with government resources and in conjunction with government officials. The Jaycee organization has defined its program of performance of governmental functions to include prison reform, job placement services, parolee counseling, construction of low and moderate income housing, drug abuse education, environmental improvement, assistance to the poor, school breakfast programs, venereal disease education, alcoholism education, mental health and mental retardation, safety and governmental affairs, for example.

In connection with the Jaycee organization's performance of governmental services in partnership with the federal government official defendants, the Jaycee organization has negotiated millions of dollars of contracts, grants in aid and financial assistance. The Jaycees obtained an award of at least $258,910.00 from the Department of Health, Education and Welfare for a United States Jaycee Alcohol Abuse Education program which objective ". . . is to develop an ongoing partnership between the Jaycees and the National Institute of Alcohol and Alcohol Abuse . . ." (Plaintiffs' Ex. 265, p. 1)* The

*References are to exhibits in the record in the Court below.

Jaycees describe project ECO, funded by the Department of Health, Education and Welfare, as ". . . a partnership between those who have the knowledge of the environment and those who have the ability to mobilize the public and the available local resources into action programs which insure the continuance of environmental education." (Plaintiffs' Ex. 264, p. 11) The Jaycees, through funding from the United States Department of Labor, counsel only male Job Corps returnees. The establishment of the program is attributed to the nature of the Jaycee membership — its vast network of members in communities across the country. (Plaintiffs' Ex. 110, p. 9 and Ex. 267, attachment) The federal government funds Jaycee efforts to educate communities on the dangers of poisons through Project Parathion. The program is assured of success, the Jaycees suggest, because of the role of its membership as catalysts. (Plaintiffs' Ex. 174, pp. 2, 3) The Jaycee Project Re-Con is a partnership between the Jaycees and federal government in a "nation-wide effort to extend citizen involvement in the promotion and operation of human improvement programs of the individuals who have come in contact with our criminal justice system." (Plaintiffs' Ex. 257, p. 1) Jaycees boast that they have constructed or are in the process of constructing over "a quarter of a billion dollars in non-profit housing" with monies obtained from the Department of Housing and Urban Development. (Plaintiffs' Ex. 251, p. 8) Project Mainstream, a multimillion dollar program funded by the federal government's Office of Economic Opportunity, is described as a "significant partnership" with the government to enable low-income families and individuals to join the economic mainstream of American life.[3] (Plaintiffs' Ex. 251, p. 7)

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[3]The foregoing are examples of the financial partnership existent between the government official defendants and the Jaycee defendants. The plaintiffs claimed at the hearing before the District Court that discovery should be completed on the involvement of the government with the Jaycee defendants prior to decision on the motion to dismiss but the Court, as is set forth more fully hereafter, entered its decision dismissing the complaint as to all defendants with discovery incomplete.

Of the problems which the United States Jaycees have defined for their attention and of the programs which the United States Jaycees have initiated, all of those Jaycee programs are currently being funded in some respect by the federal government or the Jaycee defendants are seeking government monies for the programs. The Jaycee defendants have acknowledged that in December of 1972 federal government funds accounted for approximately $985,000.00 out of a $2.5 million dollar national Jaycee budget, i.e., nearly 40 percent. Besides the multimillion dollar direct contract and financial assistance provided by the federal government offical defendants to the Jaycee organization, the federal government extends millions of dollars of benefits to the Jaycee organization in preferential tax treatment — the granting of Internal Revenue Code Section 501(c)3 or 501(c)4 tax status to all Jaycee national, state and local affiliates and/or affiliate foundations. While the United States Jaycee national office receives the substantial portion of its total operating budget from the federal government, state and local affiliates are also dependent on the tax dollars and financial assistance of city and state governments in the performance of the state and local activities of the organization.

The basis for the Jaycee organization receiving government grants and monetary assistance is the large membership of the Jaycee organization (at least 300,000 members, 6,000+ local affiliates, 51 state affiliates, national staff), the involvement of the membership in leadership positions in communities throughout the country and the availability of the mass membership to volunteer or donate some of their time in the performance of governmental functions.

For example, in justifying the federal government's granting the United States Jaycees a multimillion dollar appropriation to assist the development of the federal government's Equal Employment Opportunity Community Action Agencies, the Jaycees suggested that there ought to be developed a "working

partnership between the Jaycees and Community Action Agencies" because the Jaycees "are an established resource with expertise in educating and mobilizing the public into action programs." Thereafter, the Jaycees outline how the appropriation of government funds in this instance will "indirectly affect the entire Jaycee membership." (Plaintiffs' Ex. 26)

In this same OEO grant application, the Jaycees underscore the benefit which the federal government will obtain by making direct grants to the Jaycees for the performance of government's work. The Jaycees describe in detail how donating the all male membership has multiplied many times the actual value of the government expenditure. Thus, for example, in a 1970 "Do Something" program, the Jaycees calculated that from the original grant of $40,500.00, with volunteer time counted at $2.00 an hour, the Jaycees actually produced governmental service in value of $11,196,944.00.

The plaintiffs allege that this partnership relationship of the government contracting with the all male Jaycee organization for the performance of work which the government is responsible to perform, directly fosters sex discrimination in violation of the Fifth and Fourteenth Amendments to the Constitution and the national policy against discrimination. The government purchases and utilizes the mass male membership of the Jaycee organization to perform its work and to popularize its programs through grass-roots citizen participation efforts in communities throughout the country. The Jaycees utilize government monies to foster the organization's espoused goal of developing leadership skills of "all young men who are affected by this organization, so that they might confront all community problems with imaginative, people-oriented solutions." (Plaintiffs' Ex. 24, p. 2) The government therefore finances an all male leadership training program.

Because of this ongoing relationship, the Jaycees directly involve their membership at the highest levels of local, state and

national government in highly recognized and high profile government civic improvement and social service projects. Through this involvement, the stature of the Jaycee organization is raised to one of influence and prestige.[4] The federal government gains the services of male Jaycee "volunteers" who aspire to obtain positions of leadership in the community by working in cooperation with government officials at all levels.

After the lawsuit was transferred to the Northern District of Oklahoma, the government official defendants moved, by motion of April 12, 1973, to dismiss the complaint on the grounds that no cause of action is stated and the lawsuit is barred by the doctrine of sovereign immunity.[5] Further, the government opposed plaintiffs' application for a three-judge court. The Jaycee defendants answered with general denials, raising the affirmative defense of failure to state a claim. The Jaycee defendants also counterclaimed for judgment awarding them the exclusive use of the names and designations "Jaycees", "Junior Chamber of Commerce", "J.C.'s" or similar names and for judgment of $50,000.00 against each plaintiff.

[4]The Director of the Office of Economic Opportunity at the time of the first grant to the Jaycees was former Jaycee Phillip Sanchez. The grant to the Jaycees was approved in spite of the advice by the Associate Director for Human Rights of the Office of Economic Opportunity that "The Jaycees have a long history of discrimination against women, i.e., female membership in this organization is prohibited." (Plaintiffs' Ex. 187) OEO officials have described their relationship with the Jaycees as one where ". . . we can hold hands here at the headquarters level, even give you some money to set up the structure, if you need it, that will enable you to work with 370,000 Jaycees. . ." (Plaintiffs' Ex. 186) While OEO was in the process of sharply curtailing its operations, the Jaycees, in June of 1973, were assured of new federal monies.

[5]While the government official defendants maintain there is no constitutional or statutory bar to their financial partnership with the Jaycee defendants in hiring males to perform governmental functions, the government in *International Fraternity of Delta Sigma Pi v. Weinberger, et al.* Docket No. 74C 1051, U.S.Dist. Ct., Northern District of Illinois, Eastern Division, is defending its judgment that the University of Illinois must sever all its ties with Delta Sigma Pi, a college undergraduate fraternity which admits only males, or lose federal funding.

By order of May 4, 1973, the district court judge, the Honorable Luther Bohanon, scheduled an "evidentiary hearing" on the motion to dismiss for June 13, 1973, directing that the plaintiffs show why the lawsuit could be maintained against each of the defendants, why the action should be maintained as a class action, why a three judge court should be convened, among other points. Counsel were invited to offer "any other pertinent evidence."

Prior to the "evidentiary hearing", plaintiffs filed Request for Admissions, Notice to Produce and Interrogatories. The defendants never fully complied with the discovery requests, maintaining that they did not have sufficient opportunity to assemble the information requested and that the information was not available in Tulsa — although on their motion for transfer to the Northern District of Oklahoma, they claimed records were in Tulsa.

With the consent of all parties, the Court filed plaintiffs' amended complaint, on June 13, 1973. The Philadelphia Jaycees, its foundation, the New Orleans Jaycees and certain of the male and female members of Philadelphia and New Orleans Jaycees were added as plaintiffs and named members of the class. Sydnee Schwartz and Joan H. Slyne, females who have been denied opportunities for membership in the District of Columbia Jaycees and the Orrington, Maine Jaycees were also added as plaintiffs and named members of the class. The respective state affiliates of the Jaycee organization were added as defendants.[6]

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[6]The threat of the Jaycee organization to expel the Philadelphia Jaycees because it had admitted women on an equal basis with men was imminent at the time of the "evidentiary hearing". Plaintiffs requested temporary injunctive relief to prevent this expulsion and any other action against any class member. The Jaycee defendants agreed to a temporary restraining order, renewable at ten-day intervals, restraining action against plaintiffs and class members. Immediately on learning of the district court's decision dismissing the complaint, the Jaycee defendants expelled the Philadelphia Jaycees. The Tenth Circuit Court of Appeals refused to grant plaintiffs' immediate application for injunctive relief to restore Philadelphia Jaycees to membership and to prevent further acts against the plaintiffs and class members. Thereafter, the New Orleans Jaycees and its President, Richard Esteves, withdrew their appeal from the district court decision after continued threats from the Jaycee defendants as to the possible expulsion of the New Orleans chapter.

At the "evidentiary hearing", the judge allowed plaintiffs, over the objection of the defendants to introduce evidence of the official government defendant and Jaycee partnership which had been disclosed in the brief period prior to the "evidentiary hearing".[7] While the judge directed the Jaycee defendants to furnish additional information to the plaintiffs within seven days of the completion of the "evidentiary hearing" on the government official defendants' extension of tax benefits to the Jaycee defendants, the Jaycees did not comply with that direction and the district court judge issued his order dismissing the complaint with discovery incomplete.

Judge Bohanon, in a two-page opinion, on June 26, 1973 dismissed the complaint against all defendants without citing any authority as to why the complaint failed to state a claim.[8] The court characterized the complaint as failing to state that "... any of the funds granted or allowed to the Jaycees for sponsoring these specific projects is used in any wise to promote any type of discrimination." (B-3)[9] The District Court did not discuss any of the evidence in the record in the form of copies of federal contracts with the Jaycee defendants which illustrate the performance of governmental functions by the all male Jaycee

[7]Plaintiffs also stressed that the legality and constitutionality of the Jaycee organization excluding women from membership and the government's furnishing of the critical financial support to the Jaycee organization are issues of national importance being raised certainly in every major metropolitan area of the United States where there is a Jaycee local affiliate. The plaintiffs introduced documentary evidence of support for the plaintiffs' position from Jaycee local affiliates in all sections of the country. The Jaycee defendants have continued to threaten to expel local affiliates who admit women, the most recent such threat of expulsion having been forestalled by preliminary injunction issued in *The New York City Jaycees, Inc. v. The United States Jaycees, Inc., et al.* Docket No. 74 Civ. 652 (MIG), June 13, 1974, appeal filed June 28, 1974, with the court finding the same Jaycee/government official defendant partnership alleged herein, to constitute, in that case, state action.

[8]The District Court also ruled that there was no substantial federal question presented by the pleadings and therefore that plaintiffs' application for a three-judge court ought be denied. In the same conclusory language, the court also ruled that the action ought not proceed as a class action.

[9]References are to the Appendix of this petition.

membership. The United States Court of Appeals in its decision of April 16, 1974, affirms the District Court order dismissing the complaints as to all defendants.

The Court first suggests that plaintiffs' claims of violation of constitutional and statutory rights hardly rise to the level of jurisdictional sufficiency observing that this is ". . . somewhat of a borderline situation in which the facts are of minimal assistance," and that the Court is tempted to dismiss the case for lack of jurisdiction since ". . . the plaintiffs demand an enormous amount, that is, injunctive relief against high officials of the United States . . ." But, wishing to reach the merits of the case, the Court concludes that it will determine ". . . whether there is a sufficient federal claim upon which relief can be granted." (A-7)

Without commenting upon and apparently ignoring the substantial evidence in the record presented by the plaintiffs through documentation of projects, grants, et cetera, between Jaycee local chapters across the country and state and municipal governments, the Court concludes that there is not the "essential state action" present for the complaint to state a cause of action in violation of 42 USC § 1983. The Court disregards the evidence in the numerous exhibits before the Court which demonstrate that the essence of the Jaycee organization relationship with municipal, state and federal governmental units is the performance of governmental functions with the financial help of taxpayer dollars and in conjunction with government officials. Rather the Court concludes that the partnership relationship existing between the Jaycee organization and governments does not amount to encouragement or promotion of discrimination — that "The membership policy against which the attack has been leveled has no connection with the state activity of the United States Jaycees." (A-9)

While recognizing in its opinion that the ". . . evidentiary hearing held by the District Court revealed that the United

States Jaycees administer substantial grants on behalf of the government."[10] (A-4), the Court continues to ignore the substance of the evidence demonstrating the government's contracting for the performance of its governmental functions by males only. The Court holds that there is not "sufficient *nexus*" between the discriminatory membership policies and the expenditure of government funds. The Court observes that the criteria announced by this Court ". . . have tended to require that the alleged unconstitutional conduct relates specifically to governmental action." (A-12) Thus, though the federal government's support of the Jaycee organization is enormous, the Court concludes that the plaintiffs have no compiaint against the federal government to stop the multimillion dollar funding of the performance of governmental functions by all males.

Further, with respect to plaintiffs' claims that the federal government official defendants, in furnishing multimillion dollar grants in aid and tax benefits to the Jaycee organization, directly fosters, supports and perpetuates unconstitutional and illegal sex discrimination, the Court concludes that the doctrine of soverign immunity applies to exempt the government official defendants from suit. ". . . [T]here is neither an unconstitutional act on the part of the officers involved nor an action beyond the scope of the authority granted." (A-13) Finally, the Court suggests that the plaintiffs' request that the tax exempt status of the United States Jaycees be revoked amounts to ". . . tremendous and disproportionate demands which are beyond the realm in which the Court can grant relief." (A-13).

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[10]The Court refers to plaintiffs' Exhibit 23, a memorandum prepared by the Jaycee defendants regarding this case and circulated to Thomas S. Rittenhouse, later a plaintiff in this case, among others. In this memorandum, the Jaycee defendants analyze their partnership relationship with the government and conclude that "Absent new limitations on the doctrine of 'state action' . . . there is little chance that a finding of state action in the present case can ultimately be avoided." Plaintiffs' Exhibit 23, p. 16.

REASONS FOR GRANTING THE WRIT

I

The Decision Below Conflicts with the Decisions of this Court and the Decisions of other Courts of Appeals

The decision of the Court below is in direct conflict with this Court's rulings on what constitutes state action — both as to what constitutes unconstitutional federal involvement in discrimination and as to what constitutes unconstitutional involvement of government with an otherwise private entity which subjects the private entity to the restrictions of the United States Constitution. This Court, in its decision, *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), directed that there be a weighing and sifting of all the circumstances of government involvement in determining what constitutes impermissible state action.

Where the question has been presented as to what amount of activity either the federal government or a state or local government can undertake in conjunction with an entity which discriminates, this Court has underscored that any assistance by a governmental unit which significantly aids an entity which discriminates is constitutionally impermissible. *Norwood v. Harrison*, 413 U.S. 455 (1972). Commenting on impermissible government aid to racial discrimination, the Court has stated:

> ". . .[T]he Constitution does not permit the State to aid discrimination even when there is no precise causal relationship between state financial aid to a private school and the continued well-being of that school. A State may not grant the type of tangible financial aid here involved if that aid has a significant tendency to facilitate, reinforce, and support private discrimination. '[D]ecisions on the constitutionality of state involvement in private discrimination do not turn on whether the state aid adds up to 51 percent or adds up to only 49 percent of the support of the segregated institution.'" *Norwood v. Harrison*, supra, at 465-466.

This Court reiterated the absolute bar, under the Constitution, of a governmental entity aiding discrimination in any significant way with its June 17, 1974 decision in *Gilmore v. City of Montgomery*, 42 L.W. 4920 (6/18/74). The Court in *Gilmore* upheld the lower court's ruling that the City of Montgomery could not constitutionally grant exclusive use of city facilities to private, racially segregated schools. The Court reversed the lower court's ruling that a government could permit the same or similar relationship with a private group, club or organization which has discriminatory membership policies and remanded the case to the lower court to determine whether the use of city facilities by private clubs and organizations which limit membership to whites significantly aids race discrimination.

While the Court below relied on *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), in reaching its conclusion that the partnership between the government official defendants and the Jaycee organization is permissible, *Moose Lodge* actually supports a conclusion of unconstitutionality of the government-Jaycee organization partnership. As this Court has explained both in *Norwood v. Harrison*, supra, and in *Gilmore v. City of Montgomery*, supra, the furnishing by a governmental unit of generalized governmental services — electricity, water, police and fire protection — to an entity that discriminates does not in and of itself constitute a showing of state involvement in invidious discrimination. Nor did, as the Court observed in *Moose Lodge No. 107 v. Irvis*, supra, the state's extension of a liquor license to an entity which discriminates, in and of itself constitute such state involvement in invidious discrimination.

However, the factors which the Court in *Moose Lodge No. 107 v. Irvis*, supra, observed would dictate a finding of impermissible state involvement in discrimination are present in this case. The Moose Lodge was found by the Court to be a private club in the ordinary meaning of that term: having well-defined requirements for membership, conducting its activities

in private and not being publicly funded. The Jaycee organization rejects any view of itself or its activities as private. Membership of all young males in the United States is encouraged. All of its activities are public and performed in the name of the public good with the active participation and support of governments at all levels and with government furnishing the critical financial backing for Jaycee organization projects at all levels.

The Court below also misconstrues this Court's holding in *Walz v. Tax Commission*, 397 U.S. 664 (1970) when it suggests that the tax exemptions granted by the government official defendants to the Jaycee organization are ". . . even less subject to constitutional attack than would [be] an exemption granted to a church . . ." (A-11). As the lower court noted in *Green v. Connally*, 330 F.Supp. 1150 (D.D.C. 1971), aff'd. sub nom *Coit v. Green*, 404 U.S. 997 (1971), and as this Court noted in *Norwood v. Harrison*, supra, cases under the First Amendment Establishment Clause, such as *Walz v. Tax Commission*, supra, are not dispositive of cases where a practice of discrimination is under attack. The Court has acknowledged room for ". . . 'play in the joints' to the extent of cautiously delineated secular governmental assistance to religious schools, despite the fact that such assistance touches on the conflicting values of the Establishment Clause by indirectly benefiting the religious schools and their sponsors." *Norwood v. Harrison*, supra, at 469. But there is no such leeway in a discrimination case because the Constitution ". . . places no value on discrimination as it does on the values inherent in the Free Exercise Clause." *Norwood v. Harrison*, supra, at 469-470.

In considering whether the actions of an otherwise private entity have become so entwined with the activities of a governmental unit so as to warrant a finding that the actions of the private entity are in fact state action and therefore subject to the restraints of the Constitution, the *Burton v. Wilmington Parking Authority* analysis again dictates the finding that the

government-Jaycee partnership is unconstitutional. In *The New York City Jaycees, Inc. v. United States Jaycees, Inc., et al.* Docket No. 74 Civ. 652 (MIG), June 13, 1974, appeal filed, June 28, 1974,[11] the United States District Court for the Southern District of New York, the Honorable Murray I. Gurfein presiding, ruled that, paraphrasing *Burton v. Wilmington Parking Authority*,

> "I think here the federal government 'has so far insinuated itself into a position of interdependence with [National] that it must be recognized as a joint participant in the challenged activity, which on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth [Fifth] Amendment.' " (C-13).

The Court in the *New York City Jaycees, Inc. v. United States Jaycees, Inc., et al.* had before it the impending action of the United States Jaycees to expel the New York City Jaycees for admitting women to membership — one of the same questions and of course the central question in this lawsuit, i.e., the exclusion of the Rochester Jaycees by the United States Jaycee organization because of the admission of women to membership.

Counsel for the United States Jaycees argued, in defending against a finding of state action and the issuing of a preliminary injunction, that this case dictates a finding of no state action. However, the New York Court notes that the facts in the lower court's decision in this case "... are not clearly set forth. Moreover, if the record in the District Court in Oklahoma is substantially the same as that in this Court, then I must respectfully disagree with that part of the opinion." (C-15, n. 34).

The record in this case is substantially the same record as that in *The New York City Jaycees, Inc., v. United States Jaycees, Inc., et al.* The Court found as fact in *The New York City Jaycees, Inc. v. United States Jaycees, Inc., et al* that the program emphasis of the Jaycee organization is on community

[11] This decision, as yet unreported, is Appendix C hereto.

services such as low-cost housing, prevention of child abuse, convict rehabilitation, transportation for the elderly, control of the environment, and many other civic activities and that membership in the Jaycees "... is also still linked to advancement in the business community." (C-4) Plaintiffs in this case made similar allegations and substantiated those allegations in the record from testimony and with the introduction of documents.

The Court in *The New York City Jaycees, Inc. v. United States Jaycees, Inc., et al* found that the United States Jaycees for one fiscal year received nearly as much money from the federal government as it received in dues from its own members[12] and that the United States Jaycees and/or its wholly owned foundation is the recipient of multimillion dollar grants from the Department of Health, Education and Welfare, the Office of Economic Opportunity and the Labor Department. The record in this case contains not only copies of those federal grants but also copies of other federal grants to the Jaycee organization and foundation plus a number of project reports by the Jaycee affiliates across the country demonstrating the reliance of the Jaycee affiliates on tax dollars from municipal and state governments in addition to the federal tax dollar.

The largest single government grant to the Jaycee organization, the OEO Project Mainstream grant to which the District Court in *The New York City Jaycees, Inc. v. United States Jaycees, Inc., et al*, supra, makes frequent reference, is in evidence in this case. The "... congeries of factors here involved make the action of the United States Jaycees in attempting to revoke the charter of the New York City chapter 'state action' and subject to the jurisdiction of the federal courts." (C-13) So too is the action of the United States Jaycees in excluding the Rochester Jaycees because it admits women to membership impermissible state action.

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[12]For budget year ending July 1, 1974, the United States Jaycees received $1,143,000.00 of its $3,639,000.00 budget from the federal government while receiving $1,200,000.00 in membership dues. (C-4)

The finding of the Court below that the Jaycee-government partnership does not constitute state action is contrary to the findings of other Courts of Appeals of state action on less indicia of government involvement in the private entity activities. For example, in *Sam's v. Ohio Valley General Hospital Association*, 413 F.2d 826 (4th Cir. 1969), *Smith v. Hampton Training School for Nurses*, 360 F.2d 577 (4th Cir. 1966), *Simkins v. Moses H. Cone Memorial Hospital*, 323 F.2d 959 (4th Cir. 1963), cert. den. 376 U.S. 938 (1964), the Courts found the action of private hospitals in discriminating as to staff appointments and hospital privileges, as to patients or as to the use of the employee dining room, to be state action where the hospital receives substantial federal money. In *Smith v. Young Men's Christian Association of Montgomery, Inc.*, 316 F.Supp. 899 (M.D. Ala. 1970), modified and aff'd., 462 F.2d 634 (5th Cir. 1972), and in *Kerr v. Enoch Pratt Free Library*, 149 F.2d 212 (4th Cir. 1945), cert. den. 326 U.S. 721 (1945), the Courts held the exclusion of blacks by a private entity was unconstitutional because the private entity was performing a public function — recreation and library, respectively — with substantial government assistance. The facts in this case meet all the criteria for a determination of state action as outlined by the Second Circuit Court of Appeals in its recent decision, *Jackson v. The Statler Foundation, et al.* Docket No. 73-1543, September Term, 1973, Slip Opinion April 5, 1974.

II

There are Important Federal Jurisdictional and Procedural Issues Involved

The Court below, in affirming the dismissal of plaintiffs' complaint created grave issues of federal jurisdiction and procedure. The Court's conclusion that plaintiffs' claims against the government official defendants that their actions are either beyond their delegated powers or the delegated powers are unconstitutional are without merit flies in the face of this Court's

direction that on a motion to dismiss, a federal court must give the complaint its broadest reading, accepting as true the allegations in the complaint. *Conley v. Gibson*, 355 U.S. 41 (1957).

The conclusion of the Court below that plaintiffs' prayer to void the tax exempt status of the United States Jaycees is ". . . beyond the realm in which the Court can grant relief," (A-13) ignores the summary affirmance by this Court of *Green v. Connally*, supra. In *Green v. Connally*, supra, the Court upheld denial of tax exemptions to private, white academy foundations which exclude enrollment of blacks. The Court concluded that the granting of tax exempt status to such entities which discriminate is not within the delegated powers of government officials, thereby avoiding the constitutional question. The plaintiffs in this case make the same arguments — that the extending of the multimillion dollar tax benefits by the government official defendants to the Jaycees promotes the sex discrimination of the Jaycees and that such acts of government officials are not within their delegated powers or the powers are unconstitutional.

Since the *Green v. Connally* case, the same arguments have been made with success in various other lawsuits. See for example, *McGlotten v. Connally*, 338 F.Supp. 448 (D.D.C. 1972); *Pitts v. Department of Revenue*, 333 F.Supp. 662 (E.D. Wis. 1971); *Falkenstein v. Department of Revenue*, 350 F.Supp. 887 (D. Ore. 1972), appeal dismissed, 409 U.S. 1099 (1973); see also, *Jackson v. The Statler Foundation, et al*, supra, where the Court remanded a pro se complaint, noting that the plaintiff could state a claim against the government by adding the appropriate government official defendants. No court, with the exception of the Court below in this case, has ever suggested that the government official defendants involved in promoting discrimination through the extension of tax benefits to entities which discriminate are immune from suit or that the request for injunctive relief to discontinue the extending

of that official support of discrimination are "... demands which are beyond the realm in which the Court can grant relief."[13]

III

The Decision Below Raises Significant and Recurring Problems Concerning the Rights of Female Citizens to Equal Protection of the Laws.

This Court has acknowledged this country's unfortunately long history of discriminating against women, and the federal government's commitment, in various legislation, to end discrimination on the basis of sex. *Frontiero v. Richardson*, 411 U.S. 677 (1973). Indeed, the Court below at least recognizes the constitutional guarantee of equal treatment for women by observing that, "There is no dispute about the invalidity of discrimination by the state or federal government based on sex and there is no dispute about the fact that the plaintiffs were excluded from membership in the organization purely on the basis of sex." (A-5) However, the Court below proceeds to dismiss all of plaintiffs' claims by concluding that there is no "nexus" between the Jaycees receiving millions of dollars in

[13] While the Court, after laborious consideration of the point, finally concludes that it has jurisdiction to consider plaintiffs' claims, its observation that this case is a "borderline situation" of jurisdiction has astounding implications for what was thought to be well-settled recognition of the right of persons in this country to litigate claims of violation of constitutional rights in the federal courts. This Court's rule on reviewing a complaint for the statement of a claim of violation of constitutional right is, as the Court below noted in referring to *Bell v. Hood*, 327 U.S. 678 (1946) and *Bivens v. Six Unknown Named Agents*, 403 U.S. 388 (1971), that a suit may be dismissed for lack of jurisdiction only where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous. The federal government's fostering of sex discrimination by the furnishing of critical monetary support to the Jaycee organization through multimillion dollar contracts, grants in aid, financial assistance and tax benefits — all in violation of the Constitution and the national policy to end discrimination on the basis of sex — is hardly a wholly insubstantial or frivolous claim.

federal tax monies and tax benefits and the administration of Jaycee social improvement projects.

The federal government purchases the all male membership of the Jaycees to perform governmental functions through the extension of multimillion dollar grants in aid and contracts to the Jaycee organization. This Court, time and again, in the context of scrutinizing governmental activities, has held that a government may not induce, encourage or promote private persons to accomplish what it is constitutionally forbidden to accomplish. See for example, *Norwood v. Harrison*, supra, and cases cited therein. The government may not, under the Constitution, hire only blacks or only whites to perform its work; nor can the government, under the Constitution, hire only males to perform its work, as it does when it contracts with the all male Jaycee organization to perform governmental functions.

The decision of the Court below, notwithstanding its acknowledgment of the illegality of discrimination on the basis of sex, contravenes this Court's holdings in *Frontiero v. Richardson*, supra, and *Reed v. Reed*, 404 U.S. 71 (1971), that discrimination on the basis of sex is invidious discrimination and unconstitutional under the Fifth and Fourteenth Amendments to the United States Constitution. Presented with the same fact pattern as in this case, the Court in *The New York City Jaycees, Inc. v. United States Jaycees, Inc., et al* found that, in line with this Court's decisions in *Reed v. Reed*, supra, and *Frontiero v. Richardson*, supra, the irrational exclusion by the Jaycees of females from membership violates the constitutional guarantees of equal protection. In the Court's view, sex discrimination stands on the same footing as race discrimination — both equally prohibited by the Constitution. "We may, accordingly, think of sex as a suspect class not only in the test of what is discrimination but in the tilting of the scale in what constitutes state action." (C-13).

This Court ought to act to clarify once again for all federal courts that sex discrimination is invidious discrimination,

prohibited, as race discrimination, by the Constitution and that government involvement in activity which directly or indirectly fosters, promotes or in any way significantly aids sex discrimination is unconstitutional. Further, the Court ought accept this case for review and clarify for all federal courts that the entwining of the activities of government with a private entity in a partnership relationship for the performance of governmental functions constitutes state action and compels the private entity to follow the dictates of the United States Constitution, in this case admitting females to membership on an equal basis with men.

CONCLUSION

For these reasons, Writ of Certiorari should issue to review the judgment and opinion of the Tenth Circuit.

Respectfully submitted,

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July 11, 1974

APPENDIX A

Appeal from the United States District Court for the Northern District of Oklahoma (D.C. No. 73-C-66)

UNITED STATES COURT OF APPEALS

Tenth Circuit

No. 73-1560

JUNIOR CHAMBER OF COMMERCE OF ROCHESTER, INC., Rochester, New York, et al.,

Plaintiffs-Appellants,

v.

THE UNITED STATES JAYCEES, Tulsa, Oklahoma, et al.,

Defendants-Appellees.

Judith R. Cohn of Wolf, Block, Schorr and Solis-Cohen, 12th Floor, Packard Building, Philadelphia, Pennsylvania (E. Gerald Riesenbach of Wolf, Block, Schorr and Solis-Cohen, on the brief), for Appellants Junior Chamber of Commerce of Philadelphia, Pennsylvania, Thomas S. Rittenhouse, Beverly Lynn Benson, Margaret M. Hipple and Roberta M. Schneider; Emmelyn Logan-Baldwin, 19 Arnold Park, Rochester, New York for Appellants Junior Chamber of Commerce of Rochester, Inc., Janis Gaines, Jane Selman, Charles Wetmore, James T. Bruen, David Heiligman, Thomas Banaszewski and Sydnee Schwartz; Debra A. Millenson, 1800 G Street, N.W., Washington, D.C., for Appellant Joann Clevenger; Josephine L. Citrin, 18 Cobbert Road, Portland, Maine, for Appellant Joan H. Slyne; S. Chandler Visher and James Hautsinger of Dawson, Nagel,

Sherman & Howard, 1900 First National Bank Building, Denver, Colorado, local counsel to all Appellants.

Robert J. Corber, 1250 Connecticut Avenue, N.W., Washington, D.C. (Gary Taylor, 2301 First National Bank Building, Denver, Colorado, and Ronald S. Cooper and Kenneth I. Jonson II, 1250 Connecticut Avenue, N.W., Washington, D.C., Of Counsel, on the brief), for the private Appellees.

Ann Belanger, Attorney, Tax Division, Department of Justice, Washington, D.C. (Scott P. Crampton, Assistant Attorney General, Meyer Rothwacks and Jonathan S. Cohen, Attorneys, Tax Division, Department of Justice, Washington, D.C. and Nathan G. Graham, United States Attorney, Of Counsel, on the brief), for the federal Appellees.

Before BREITENSTEIN, McWILLIAMS and DOYLE, *Circuit Judges.*

DOYLE, *Circuit Judge.*

This is a sex discrimination case. Appellants seek review of a judgment of dismissal of the United States District Court for the Northern District of Oklahoma. The claim of the appellants in the District Court was that the United States Jaycees unconstitutionally excluded the Junior Chamber of Commerce of Rochester, New York and the individual appellants from affiliation and membership in the United States Jaycees. Similar claims are asserted by the Junior Chamber of Commerce of Philadelphia and of New Orleans, Louisiana, and individual members of those organizations. Appellants also asserted in District Court that certain named federal officers impermissibly support the United States Jaycees and various state and local Jaycee chapters by allowing them tax exemptions and by utilizing them to implement federal grants and programs.

The controversy was the result of the United States Jaycees' bylaws limiting membership to males. On this account the Junior Chamber of Commerce of Rochester was expelled from the United States Jaycees because it had chosen to admit women as members. Individual members of the Rochester Jaycees were then prevented from becoming affiliated with the United States Jaycees and thereby lost certain opportunities to take part in the charitable work of the United States Jaycees, part of which involved the transmission of federal funds to the needy. Appellants allege that the United States Jaycees are violating the Fifth and Fourteenth Amendments to the United States Constitution and the Civil Rights Act, 42 U.S.C. §1983, by prohibiting women from becoming members of the United States Jaycees and any state or local Jaycees organization. [1]

Various federal statutes, including the Civil Rights Act of 1964 as amended by the Equal Employment Opportunity Act of 1972, are relied on to gain admittance to federal court for the purpose of asserting the alleged violation. According to the allegations of the amended complaint, the Jaycees and various state chapters thereof received substantial tax benefits under §§501(c) (3) and (c) (4) of the Internal Revenue Act and also various federal grants and contracts from OEO and other departments of the United States Government. It is alleged that the various Jaycee organizations use federal funds to sponsor HEW programs, including construction of housing projects and assistance to underprivileged children.

From all of this, it is the position of plaintiffs that the United States Jaycees is in practical effect an arm of the government and that therefore when it discriminates in its membership

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[1] Why the defendant Jaycees would so adamantly oppose members of the feminine sex in its organization is most difficult to understand. It may well be that they fear the competition. They may indeed be concerned as to the known propensity of members of the feminine sex to devote themselves to causes such as this. We are not, however, permitted to pursue this inquiry — our mission being to ascertain whether the action complained of is sufficiently governmental to justify the federal courts' entertaining and taking cognizance of the claims.

policies it is acting officially. On this basis appellants claim that their rights are subject to the protection of the Fifth and the Fourteenth Amendments to the Constitution of the United States and are violated by the Jaycees' exclusionary membership policies.

The plaintiffs do not contend that they have any direct pecuniary interest in the funds which have been mentioned. An evidentiary hearing held by the District Court revealed that the United States Jaycees administer substantial grants on behalf of the government. A memorandum admitted into evidence showed that government funds distributed by the United States Jaycees amounted to approximately $985,000. However, the rights which the plaintiffs say were invaded were not monetary. Rather, they contend that they were deprived of leadership training and administrative experience.

The District Court ruled that the complaint failed to state a claim because the federal question was insubstantial. The court there noted that the plaintiffs had failed to allege any direct relationship between the discrimination against the plaintiffs and the distribution of government funds.

In support of their contentions that the discrimination is of constitutional dimension, the plaintiffs cite cases recognizing the invalidity of discrimination both in educational areas and in employment. *See* Frontiero v. Richardson, — U.S. —, 93 S.Ct. 1764 (1973). In *Frontiero* there was a federal statute which differentiated between housing and medical benefits available to married male and female members of the armed forces. The Supreme Court condemned this as unconstitutional, citing Reed v. Reed, 404 U.S. 71 (1971). Four members of the court held that classifications based upon sex were to be considered suspect. This shifted the burden to the government to establish the validity of such classifications and gave rise to the necessity for strict judicial scrutiny. In *Reed* the Supreme Court had ruled that an Idaho statute giving preference to males over females as

administrators of estates was an unconstitutional violation of the equal protection clause.

There is no dispute about the invalidity of discrimination by the state or federal government based on sex and there is no dispute about the fact that the plaintiffs were excluded from membership in the organization purely on the basis of sex. Therefore, the only issue is whether the discrimination can by reason of the circumstances present, be considered official (state or federal) action. It must also be conceded that private discrimination does not give rise to a constitutional violation. *See* Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972).

The Supreme Court had held that entities which are ordinarily private but which perform governmental services cannot discriminate in carrying out their functions. Such agencies are subject to constitutional prohibitions. *See, for example,* Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).

I.

We proceed to consider whether the plaintiffs have established a case under the Constitution and laws of the United States including 28 U.S.C. §1331, which implements the "arising under" clause of Article III of the Constitution and authorizes suits arising under the Constitution and laws of the United States in which the amount in controversy exceeds $10,000.

The District Court did not dismiss the cause for lack of jurisdiction. It correctly entertained the action and then dismissed it because of plaintiffs' failure to show a substantial federal question.

In Bell v. Hood, 327 U.S. 678 (1946), a suit against agents of the FBI seeking damages for violations of the Fourth and Fifth Amendments, it was alleged that there were unconstitutional

arrests, searches and seizures. The district court and the court of appeals dismissed for want of jurisdiction. However, the Supreme Court reversed these holdings, stating that the court must assume jurisdiction in order to decide whether the allegation stated a cause of action on which the court could grant relief as well as to determine the issues of fact arising in the controversy. According to the Supreme Court, jurisdiction is not defeated by the possibility that the complaint does not state a claim for relief. This is a question of law which must be decided by the court after the parties have advanced beyond the threshold of the court. The Supreme Court concluded in Bell v. Hood that a federal court has jurisdiction to entertain an action under 28 U.S.C. §1331 if the complaint asserts a reasonable claim seeking recovery directly under the Constitution or laws of the United States. Under the two exceptions to this rule, a suit may be dismissed for lack of jurisdiction only where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous. 327 U.S. at 682.

Subsequently, in Bivens v. Six Unknown Named Agents of Fed. Bur. of Narc., 403 U.S. 388 (1971), the Court went much further in delineating the scope of federal court jurisdiction arising under the Constitution and laws of the United States. The *Bivens* Court proceeded to carve out a damage remedy in federal civil rights actions based on violation of the Fourth Amendment. This approach is in accord with Gully v. First Nat. Bank in Meridian, 299 U.S. 109 (1936) and Smith v. Kansas City Title & Trust Co., 255 U.S. 180 at 199-200 (1921).

The Wright edition of Barron and Holtzoff, Vol. 1 at pp. 122-23, points out that whether there is a claim presenting a federal question and whether that claim is well founded when considered on its merits are two separate and distinct questions. The author goes on to say:

> However, the [federal] question must be substantial and not frivolous or a mere matter of form. A claim is not substantial if it is obviously without merit, or foreclosed by prior authoritative decisions. A proposition settled by the Supreme Court no longer presents a federal question for jurisdictional purposes. At the same time, a claim properly based on federal law raises a federal question even though all parties may agree as to the legal principles involved and disagree only as to the facts of the particular case.

It is difficult to apply jurisdictional principles to the instant case, which is somewhat of a borderline situation in which the facts are of minimal assistance. In the final analysis the plaintiffs demand an enormous amount, that is, injunctive relief against high officials of the United States, which relief would interfere with the administration of the tax laws affecting the allowance of tax exemptions. Plaintiffs make these extreme demands even though the tax benefits extended are not directly related to the discrimination complained of. Thus it comes close to a situation in which there is at least some temptation to ground the decision on lack of jurisdiction. Since, however, it is more a matter of form and procedure to dismiss the cause out of hand, we choose to accept jurisdiction and then to consider whether plaintiffs present a meritorious claim under the Constitution and laws of the United States.

The dichotomy between the jurisdictional question and the question of considering the claim on the merits is far from clear in the instant case. However, in view of the fact that the plaintiffs offered evidence to show that the various statutes were applied in an unconstitutional way, it appears to us that the cause is not one in which there is a palpable deficiency in the area of jurisdiction. Accordingly, we determine whether there is a sufficient federal claim upon which relief can be granted.

II.

The first question is whether there is a violation of 42 U.S.C. §1983 which gives a remedy to persons whose civil rights have been invaded by officers acting under color of state law. Although plaintiffs have invoked this provision, they have not emphasized the official state action approach. Rather, the thrust of their argument is that there has been a violation of their constitutional rights because of the close relationship of the Jaycees with the *United States Government*. Indeed, they have not set forth either in their amended complaint or in their briefs a clear-cut theory in support of their alleged §1983 claim. From a search of the record it would appear that the §1983 claim is predicated on the fact that in some instances, and particularly in connection with the Rochester Jaycees, federal funds have been awarded by the United States to state agencies, which in turn have made grants to the local Jaycees chapter for use in activities sponsored by the Jaycees, such as drug abuse and minority betterment programs.

We fail to see that there is present the essential state action. It is one thing to say that the private organization has state character where it induces, encourages or promotes private persons to accomplish what it is constitutionally forbidden to accomplish. Norwood v. Harrison, 413 U.S. 455 (1973). We do not have such encouragement or promotion here. The Constitution applies if the private action complained of is in essence the action of the government. Burton v. Wilmington Parking Authority, *supra*. The plaintiffs would have us rule that because the Jaycees are *used* by the state government to dispense funds on its behalf that all their conduct automatically becomes state action subject to a §1983 suit regardless of whether there exists discrimination by the private entity in the dispensing of the funds. In effect, then, plaintiffs say that the state must, consistent with the Constitution, refrain from dealing with discriminators regardless of whether the discrimination is related to the alleged state action. We disagree.

Our court has adopted a more restricted view of what is state action on at least two occasions. In Ward v. St. Anthony's Hospital, 476 F.2d 671 (10th Cir. 1973), it ruled that a hospital which had received some governmental funding as a small percentage (5%) of its total construction funds was not subject to civil rights actions against its hospital board even though the operation of the hospital was extensively regulated by the state. It was stressed that the acts complained of did not thereby serve to clothe the hospital with sufficient state authority so as to constitute state action. The opinion by Judge Hill also emphasized that the facts failed to establish that the State of Colorado had any part in the alleged deprivation. It was said that the regulation by the state existed only in order to assure quality medical services. Thus, none of the evidentiary matters there presented deprived the hospital of its private status or involved the state in the alleged violations of the Federal Constitution. *Cf.* the Civil Rights Cases, 109 U.S. 3 (1883).

Browns v. Mitchell, 409 F.2d 593 (10th Cir. 1969) also held that unrelated and collateral discriminatory policies of private organizations do not furnish the state action necessary to a civil rights suit. The plaintiffs in *Browns* sought to establish that the University of Denver, a private institution, had state character and was subject to the Constitution and laws of the United States because of a substantial state tax exemption which extended to property operated for profit. In rejecting this, the lack of connection between the tax exemption and the conduct complained of was emphasized.

The membership policy against which the attack has been leveled has no connection with the state activity of the United States Jaycees. Neither the complaint nor the record establishes or promises to establish the kind of state involvement essential to a civil rights action under § 1983.

III.

There are very few cases involving federal action as distinguished from state action, but similar distinctions between acts of the government subject to constitutional limitations and private actions to which the Constitution does not apply obtain. Thus, the state action cases in which the Supreme Court has enunciated the applicable legal criteria must be considered, and generally the rule which has been adopted as to the state action (that the state itself must have some connection with the discrimination) would apply.

In Burton v. Wilmington Parking Authority, *supra*, the Supreme Court condemned discrimination by a restaurant-lessee of a Delaware parking garage or authority, saying that its refusal to serve a black patron constituted state action. Similarly, in Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), a black patron, who was a guest of a member of the Moose Lodge, was refused service at the club's dining room and bar solely because of his race. The lower court found that the lodge's membership and guest practices were discriminatory and constituted state action. It declared the state liquor license invalid as long as the club's practices were continued. The Supreme Court adopted a narrower view, holding first that the plaintiff-appellee lacked standing to challenge the membership practices of the Moose Lodge, although he did have standing to litigate the validity of the refusal of the lodge to serve him. The Supreme Court then held that Pennsylvania's regulation of liquor traffic was not sufficient to implicate Pennsylvania in the discriminatory guest practices which were employed by the Moose Lodge. The Court further determined that there was no evidence in the record that the regulation of the sale of liquor was intended "overtly or covertly to encourage discrimination." We have concluded from this decision that there must be a sufficient *nexus* between the discrimination and the alleged state action in order to render the activity a constitutional violation.

An even more persuasive analogy is found in Walz v. Tax Commission of City of New York, 397 U.S. 664 (1970). Here a real estate owner sought to enjoin the Tax Commission from granting exemptions to religious organizations for properties used solely for religious worship. The Supreme Court held that the New York state statute exempting from real property tax an association organized exclusively for religious purposes was not unconstitutional in that it did not itself attempt to establish, sponsor or support religion. The Supreme Court said that the religious clause of the First Amendment does not require absolute abstention by the state from extending any aid to religious organizations. The state may therefore determine that entities which foster moral or mental improvement are not to be inhibited in their activities by *ad valorem* taxes or the hazard of loss of their properties for non-payment. By so doing, the Court reasoned, the government is not thereby sponsoring religion. It is a less direct subsidy than a cash support. Therefore, the Supreme Court reasoned, when the government grants an exemption which does not actually involve the state with the activities of the beneficiary, "there is no genuine nexus between tax exemptions and establishment of religion."

In the case at bar the exemption granted to the United States Jaycees would be even less subject to constitutional attack than would an exemption granted to a church, for in the latter case (the *Walz* case) the proscriptions of the First Amendment expressly require the separation of church and state.

We do not say that the relationship between the United States and the United States Jaycees is so remote that the actions of the Jaycees could never be attributed to the government. If, for example, the Jaycees administered the government's funds in a discriminatory manner, a remedy for constitutional violation might well obtain. In our case, however, the question is whether the United States is obligated to see to it that the United States Jaycees' conduct shall be exemplary quite apart from its administering of programs and governmental funds. No case has

been cited which extends to this length. On the contrary, the criteria announced by the Supreme Court have tended to require that the alleged unconstitutional conduct relate specifically to governmental action.

This cause presents other problems which are argued in the briefs and to which we will briefly allude. Plaintiffs are seeking injunctions against high government officials first to prevent the making of grants for the use of the deprived and needy and, second, to void the tax exempt status of the United States Jaycees for collateral reasons not set forth in the statutes creating the grants or exemptions. These demands create practical as well as legal problems. Thus, the court is reluctant to interfere with the processes of government and, in effect, to write a tax statute which declares that government officials are obligated to withhold benefits to organizations which are general sinners regardless of whether the sins are committed in the disposition of the government's funds.

One legal obstruction is the doctrine of Dugan v. Rank, 372 U.S. 609 (1963); Larson v. Domestic and Foreign Corp.; 337 U.S. 682 (1949), and Land v. Dollar, 330 U.S. 731 (1947), which say that when government officials are acting in accordance with the dictates and mandates of the law they are not subject to suit, that is, the suit is, in effect, against the government and the doctrine of sovereign immunity comes into play. Such suits also conflict with the prohibition against interfering with the taxing process. *See* the Anti-Injunction Act; 26 U.S.C. §7421; Enochs v. Williams Packing Co., 370 U.S. 1 (1962); State Railroad Tax Cases, 92 U.S. 575 (1875). *See also* 28 U.S.C. §2201, Declaratory Judgment Act.

The *Larson* Court recognized two exceptions to the sovereign immunity doctrine which it had applied. First, the case in which the officer is acting beyond the law and, secondly, the situation in which he is acting unconstitutionally. The Court said in *Larson* that neither exception applied and that the granting of

relief would be tantamount to an unconsented judgment against the government.

The decision of the Supreme Court in Land v. Dollar, 330 U.S. 731 (1947), an action against members of the Maritime Commission to recover shares of stock delivered to the Commission as a pledge to secure a loan to the plaintiff's corporation, followed the basic doctrine later enunciated in *Larson*. In Land v. Dollar, *supra*, the Supreme Court recognized the right of the district court to entertain the suit because potentially at least it involved invalid retention of private property.

Dugan v. Rank, 372 U.S. 609 (1963) sought an injunction against reclamation officers to prevent impounding water behind a dam. Here the Court said that neither of the exceptions noted in *Larson* were present.

In our case there is neither an unconstitutional act on the part of the officers involved nor an action beyond the scope of the authority granted. Accordingly, no basis is shown for departing from the *Larson* doctrine.[2]

Finally, then, plaintiffs make tremendous and disproportionate demands which are beyond the realm in which the court can grant relief.

For the reasons stated, the action of the District Court dismissing the cause was correct and the same is hereby approved. The judgment of the District Court is affirmed.

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[2]Furthermore, we regard the District Court as having correctly decided that plaintiffs' constitutional challenge to several federal statutes is too insubstantial to require convocation of a three-judge district court under 28 U.S.C. § 2282.

APPENDIX B

ORDER OF DISMISSAL

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA

JUNIOR CHAMBER OF COMMERCE OF ROCHESTER, INC.; JANIS GAINES, individually, and on behalf of all other persons similarly situated; JANE SELMAN, individually, and on behalf of all other persons similarly situated; CHARLES WETMORE, individually, and on behalf of all other persons similarly situated; JAMES T. BRUEN, individually, and on behalf of all other persons similarly situated; DAVID HEILIGMAN, individually, and on behalf of all other persons similarly situated; THOMAS BANASZEWSKI, individually, and on behalf of all other persons similarly situated;

Plaintiffs,

vs.

THE UNITED STATES JAYCEES, Tulsa, Oklahoma; THE NEW YORK STATE JAYCEES, Canastota, New York; THE UNITED STATES JAYCEES FOUNDATION, Tulsa, Oklahoma; THE JAYCEE MENTAL HEALTH AND MENTAL RETARDATION FUND, Tulsa, Oklahoma; THE JAYCEE WAR MEMORIAL FUND, Tulsa, Oklahoma; GEORGE P. SHULTZ, as Secretary of the Treasury of the United States, Department of the Treasury; JOHNIE M. WALTERS, as Commissioner of Internal Revenue, Internal Revenue Service; THE INTERNAL REVENUE SERVICE OF THE DEPARTMENT OF THE TREASURY OF THE UNITED STATES; PHILIP V. SANCHEZ, Director, Office of Economic Opportunity; GEORGE ROMNEY, as Secretary of the Department of Housing and Urban Development;

JAMES D. HODGSON, as Secretary of the Department of Labor; WILLIAM D. RUCKELSHAUS, as Administrator of the Environmental Protection Agency;

Defendants.

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This cause was originally filed in the United States District Court for the District of Columbia and was transferred to the Northern District of Oklahoma for trial and disposition.

The plaintiff, Junior Chamber of Commerce of Rochester, Inc., New York, amended its bylaws so as to permit females to join the organization, and the individual plaintiffs are such females who did actually join the Rochester chapter.

On February 18, 1972, the defendant United States Jaycees notified Rochester Jaycees that because of the Rochester Jaycees admitting women, the United States Jaycees were suspending Rochester Jaycees from all rights, privileges and benefits accorded the Chapter, and thereafter on March 25, 1972, the administrative arm of the United States Jaycees, New York State Jaycees, Inc., formally expelled Rochester Jaycees from membership because of admission of women.

Plaintiffs seek a declaration that the laws of the United States forbid the furnishing of financial support to the Jaycee defendants organizations which exclude females from membership and seek a permanent injunction restraining the United States Government and Secretaries of the Departments named in the Complaint as defendants from granting or continuing to grant federal support in the form of tax benefits, federal contracts and federal or governmental monetary grants and assistance, and specifically seek an Order requiring the Jaycee defendants to restore plaintiff Junior Chamber of Commerce of Rochester, Inc., to full rights and privileges as an affiliate. Plaintiffs allege and claim that specific tax exemption not enjoyed by other corporations constitutes a state action taken

"under color of state law" within the meaning of the Civil Rights Act, 42 U.S.C.A. §1983; U.S.C.A. Const. Amend. 14.

It is not alleged nor claimed by the plaintiffs that discrimination of any sort, sex, color or otherwise is employed by the Jaycee organizations in the performance of their services for public or in the sponsoring of any public service projects, and it is not claimed that any of the funds granted or allowed to the Jaycees for sponsoring these specific projects is used in anywise to promote any type of discrimination.

George P. Shultz, as Secretary of the Treasury of the United States, and the six other named United States Government officials and their departments have filed Motion to Dismiss this case upon the grounds:

1. The case is, in substance, an unconsented suit against the United States, and as such, its maintenance is barred by the Doctrine of Sovereign Immunity, and

2. The Complaint fails to state a claim upon which relief may be granted.

The remaining defendants, The United States Jaycees, Tulsa, Oklahoma, and the other named defendants, moved in their Answer to Dismiss this action for failure to state a claim upon which relief may be granted.

The record clearly shows that the Jaycee defendants are all and each of them non-profitable organizations.

The national Jaycee organization and all of its official chapters located in the various cities of the United States were organized for such educational purposes and charitable purposes as will promote and foster the growth and development of young men's civic organizations in the United States, designed to inculcate in the individual membership of such organizations a spirit of genuine Americanism and civic spirit and interest, and its membership is limited to young men only.

The Court concludes that this is not a proper class action and not superior to other more appropriate and proper methods of adjudication. See Opinion of Judge A. Sherman Christensen in *Marie Wilcox, et al. v. Commerce Bank of Kansas City, a corporation*, (10 C.A. Opinion filed United States Court of Appeals, Tenth Circuit, February 20, 1973).

From a study of the pleadings and the entire file in this case, there appears to be no substantial constitutional question involved. In fact, it appears that the constitutional issue alleged in the Complaint is totally lacking in substance, and, therefore, the Court concludes that this is not a proper case for statutory three-judge court consideration and treatment.

Upon due consideration of all the pleadings filed in this case, testimony, affidavits, briefs, the argument of counsel and the admitted facts, the Court is of the opinion that the Motion of George P. Shultz and the other six named government defendants to dismiss should be sustained.

It is the further judgment and opinion of the Court that the Motion to Dismiss for failure to state a claim against the remaining defendants should be sustained, and

It is the further judgment and opinion of the Court that all intervening complainants herein, who have intervened by agreement of the parties, have failed to state a claim against the defendants and that the Intervening Complaints should be dismissed.

IT IS, THEREFORE, ORDERED that the plaintiffs' action and Intervenors' actions against the defendants and all of them should be and the same are hereby dismissed.

Dated this 26th day of June, 1973.

/s/ LUTHER BOHANON
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
Southern District of New York

THE NEW YORK CITY JAYCEES, INC.,

Plaintiff,

against

UNITED STATES JAYCEES, INC. and NEW YORK STATE JAYCEES, INC.,

Defendants.

74 Civ. 652 (MIG)

APPEARANCES: DOMAN, STUCHINER & BEGGANS, New York, N. Y., Attorneys for Plaintiff. SHEILA MAURA KAHOE, of Counsel; RONALD EDWARD PUMP, on the Brief.

STEPTOE & JOHNSON, Washington, D. C., Attorneys for Defendant, UNITED STATES JAYCEES, INC. ROBERT J. CORBER, of Counsel.

GURFEIN, D.J.:

The New York City Jaycees, Inc. ("Local") sues to enjoin the United States Jaycees, Inc. ("National") and the New York State Jaycees, Inc. ("State") from revoking the Charter of the plaintiff.

The plaintiff has a charter granted by the national body. The by-laws of National provide that active membership is limited to young men between the ages of 18 and 36 of good moral character. It has been interpreted to exclude otherwise qualified female applicants.

Local had the same by-law and the same interpretation. On May 18, 1971 a proposal was made that the by-law be amended to strike the word "men" and to substitute the word "people." This was passed by the membership on May 31, 1973.[1]

In June, some women paid their dues and were admitted to the local chapter, and in August the dues were remitted to National by Local. In October, National notified Local that the dues would not be accepted without written verification that all members were male. Thereafter National took the dues but listed the women as "associates."

On October 10, 1973 the plaintiff received a notice that it was in violation of the by-laws of the defendant National which prohibited active membership for women. The plaintiff was ordered to show cause at the Executive Board of Directors meeting on February 16, 1974 why the plaintiff's charter should not be revoked. On February 11, 1974 this Court issued a temporary restraining order to prevent revocation of the charter.

A motion was made for a preliminary injunction and adjourned by consent. In the meantime, National proceeded to revoke the charter of Local but suspended the effectiveness of the revocation pending the determination of this action.[2]

The defendant National moved to quash service of the summons and complaint upon the ground that the Court lacked jurisdiction over its person. Rule 12(b) (2), Fed. R. Civ. P. Decision on this motion was reserved.

An evidentiary hearing was held on April 9, 1974 on the motion for a preliminary injunction.

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[1]Before it amended its by-laws, Local was advised by the New York Attorney General that he would construe failure to do so as a violation of N.Y. Executive Law § 296.6.

[2]Ex. B to Supplemental Warfield Affd.

I

The Facts Found

The plaintiff is incorporated in New York; the defendant National[3] in Missouri. National's headquarters are located in Tulsa, Oklahoma.[4] National began in 1915 in St. Louis as the Young Men's Progressive Civic Association. In 1920 the organization became the Junior Chamber of Commerce. In 1965 it changed its name to the United States Jaycees, Inc. Currently there are 6,500 local chapters in each of the 50 states and the District of Columbia with membership lists running approximately 325,000 in number. There are additionally international affiliates in 82 countries.[5]

Local was founded in 1926 under the name Young Men's Board of Trade. In 1948 it was granted a charter by National. Its name was changed in 1965 to New York City Jaycees, Inc. Local has a membership of 114.[6]

The by-laws of National require that Local's by-laws "not contain provisions contrary to [the] by-laws [of the United States Jaycees] or the Constitution of its existing state organizations . . ." Article IV By-Law 4-2.[7]

The National structure consists of a nineteen member executive committee and the presidents of all the states and District of Columbia. This Committee has the responsibility for formulating national policy and by-laws, adopting national

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[3]State is not an active defendant. When defendant is mentioned without further identification, it means National.

[4]Roper Tr. 47-48.

[5]Zirk Affd.

[6]Warfield Tr. 14.

[7]Roper Affd. 2/27/74 p. 2.

programs and annual budgets. There is also a paid staff at the national level.[8]

National provides services to State organizations and local chapters.[9] Although at one time its purpose was to promote the business interests of its members, in recent years it has broadened its membership, and its program emphasis is on community services. By the defendant's statement it is involved in programs for low cost housing, prevention of child abuse, convict rehabilitation, transportation for the elderly, control of the environment and many other civic activities. The plaintiff alleges, and I so find, that membership in the Jaycees is also still linked to advancement in the business community.

National is affiliated with the United Jaycees Foundation ("the Foundation") which is governed by a self-perpetuating board of seven Trustees. The original trustees at the time of formation of the trust were three in number and they were officers of the defendant. The Board reports annually to National's Board.

The fiscal year ended July 1, 1973 was the first year National received any federal funds. The budget for the year ending July 1, 1974 totals $3,639,000 of which $1,143,000 or 31.4% comes from funds supplied by the Federal Government. Of that amount, $545,085 is received by National directly from the Federal Government, the remaining federal funds coming through the Foundation. $1,200,000 comes from membership dues which are transmitted by mail to National by the State chapters after they have collected them from the Locals. The part of the budget not derived from federal funds and dues comes for contributions by corporations and foundations, and the sale of supplies.

The specific federal grants and contracts break down as follows:

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[8]Roper Tr. 45

[9]Roper Tr. 49.

(a) *National* itself is a party to two federal contracts: (1) For the control of venereal disease which was entered into with the Department of Health, Education and Welfare ("HEW") in the amount of $99,923;[10] and (2) for prevention of alcohol abuse, entered into with HEW for $445,162.[11] Of the latter amount, $140,000 is given for "seed" grants to local chapters and state organizations. In 1972-73, the New York State Chapter was awarded a seed grant of $500; and the Greater Pawling Local received $50.[12]

(b) *The Foundation* is a party to three federal contracts or grants: (1) A $594,000 grant for Project Mainstream, awarded by the Office of Economic Opportunity ("O.E.O.")[13] (2) $21,500 for environmental education, funded to the extent of 19% of the total by HEW;[14] and (3) $325,363 from the Criminal Justice Program which is financed by the Manpower Administration of the Department of Labor.[15]

Project Mainstream is the largest single grant. The purpose of Project Mainstream is to develop successful self-help programs by community action agencies at the local level,[16] dealing with economic development, community relations, housing, elderly assistance, recreation and the like.[17] The New York City part

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[10] Ex. D

[11] Ex. E

[12] Ex. E to Warfield Affd. Outlining Funding

[13] Ex. A

[14] Ex. B

[15] Ex. C

[16] Ex. 4

[17] Project Mainstream stems from 42 U.S.C. §2769c(c) which reads: "Programs approved under this part shall, to the maximum extent feasible, contribute to the elimination of artificial barriers to employment and occupational advancements."

of the project is for recreation in East Harlem and federal funds are used for administrative support, rent and the provision of coaches and referees. O.E.O. made the grant conditional upon acceptance of a condition barring sex discrimination.

Of the total received by the Foundation under the Mainstream project, $152,465 goes to National, and $196,535 is paid to a consulting organization known as Together, Inc. The remaining $225,000 is earmarked for "seed" grants for local organizations. The plaintiff Local has received a grant of $4,500 under this program, one-half of which has already been paid. Project Mainstream funds are available only to Jaycee Chapters in partnership with a community action agency.[18]

The Foundation has also solicited Local's involvement in another federally funded program called Project Uplift. Uplift was granted $650,000 from the O.E.O. to sponsor self-help programs.[19]

Together, Inc. has its consulting arrangement with the Foundation.[20] It coordinates and supervises Project Mainstream, and renders periodic reports to the Government, National and the Foundation.[21] Its National Advisory Council selects local Jaycee Chapters and community action agencies for awards of seed grants.[22] Four of the sixteen members of the Council are selected by National. Four of the sixteen members represent U.S. Government Departments and Agencies.[23]

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[18]Washington, member of the National Coordinating Council of Project Mainstream, Tr. 24-25.

[19]Ex. A to Warfield Affd. Outlining Funding

[20]Ex. 5

[21]Washington Tr. 32-36

[22]Washington Tr. 24-25

[23]Pl. Ex. 3

The Criminal Justice Program relates to the rehabilitation of former prisoners. The other projects are explained by their names. In addition to the earmarked community programs, National's budget is used to sponsor internal leadership programs and chapter development programs.

National is a tax-exempt organization.

National maintains no offices in New York. Its officers visit New York periodically, two or three times a year, at the Local's invitation. National has a Regional Staff Officer located in Malboro, Massachusetts, who comes to New York up to ten times a year.[24]

II

Jurisdiction over the Person

National has moved to quash the service of process on the ground of lack of jurisdiction over the person. Fed. R. Civ. P. 12(b) (2). Local asserts *in personam* jurisdiction under N.Y.C.P.L.R. § 301 and under New York's long arm statute N.Y.C.P.L.R. § 302, prescribed by Fed. R. Civ. P. 4(e). See *Gelfand v. Tanner Motor Tours, Ltd.*, 339 F.2d 317 (2 Cir. 1964).

N.Y.C.P.L.R. § 301. This provision preserves to New York courts "such jurisdiction over persons . . . as might have been exercised heretofore." Prior to its enactment, foreign corporations were held subject to personal jurisdiction only if they were found to be "doing business" in New York. *Tauza v. Susquehanna Coal Co.*, 220 N.Y. 259 (1917). New York continues to adhere to the traditional "doing business" test for jurisdiction over foreign corporations when the cause of action does not arise out of acts done in New York. *W. Lowenthal Co. Inc. v. Colonial Woolen Mills, Inc.*, 38 A.D.2d 775 (3rd Dept. 1972).

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[24]Roper Tr. at 79

The pertinent facts have already been related. Together, they constitute "doing business" in New York under existing authority.

In *B.K. Bruce Lodge, Inc. v. Sub-Committee of Management of the Grand Order of Odd Fellows in America*, 208 App. Div. 100 (1st Dept. 1924), the Court held that a fraternal benefit corporation which "enforces its policies, decrees and orders incidental to its management, and collects dues through the instrumentality of the defendant District Grand Lodge No. 2" is "doing business within the State of New York."

Judge Botein in *People v. Jewish Consumptives' Relief Society*, 196 Misc. 579, 581 (Sup. Ct. N.Y. Co. 1949), reaffirmed the validity of the *Bruce Lodge* holding. He noted that "Numerous cases have pinpricked the areas of 'doing business' as applied to stock corporations engaged in commerce. The relatively few cases relating to non-profit membership corporations do not delineate similar areas in such detail. But the common denominator for the 'business' of both types of corporation would seem to be the statutory definition, namely 'the activities for which the corporation shall have been organized.' And on that basis most of the norms prescribed for doing business by commercial corporations appear to apply with equal validity to nonprofit corporations." There, the Attorney General had sought to enjoin the Colorado based Relief Society from soliciting funds in New York. Judge Botein wrote "Clearly the extensive local activities of the defendant assume the share of doing business in this State." (Id.). National receives dues from the New York Chapter and solicits participation on projects such as Mainstream with the New York Chapter.[25] It awards "seed" sub-grants for its projects to combat alcoholism for execution by the New York Chapter. It enforces its membership policies and decrees incidental to its management to insure that

[25]The officers of the National in their capacity as trustees for the Foundation have also solicited the Local's participation in Uplift.

no women can join. And these activities have been carried on with continuity over at least the past 28 years. See *Doherty v. Moreschi*, 187 Misc. 175, 177 (Sup. Ct. N.Y. Co. 1946). ("The defendant International Union is engaged in business within this state. . . . Although not primarily organized for profit, the International carries on, within this state, with reasonable continuity, the activities which it was organized to perform.") To paraphrase *Frummer v. Hilton Hotels International, Inc.*, 19 N.Y.2d 533, 537 (1967), the "pivotal question" is whether Local does all the business the National could do were the National here by its own officials.[26]

The motion to dismiss under Rule 12(b)(2) is denied.

III

Jurisdiction over the Subject Matter

The complaint alleges subject-matter jurisdiction under 28 U.S.C. § 1343 and 42 U.S.C. § 1981. It further alleges that the action arises under the Fifth and Fourteenth Amendments to the United States Constitution and bases jurisdiction on 28 U.S.C. § 1331 and § 1343, alleging the requisite jurisdictional amount. It also alleges jurisdiction under 42 U.S.C. § 2000(d), 42 U.S.C. § 1988 and under the N.Y. State Executive Law.

Jurisdiction is sustained under 28 U.S.C. § 1331, as "arising under" the Fifth Amendment, with a finding that the jurisdictional amount is properly alleged. *Bell v. Hood*, 327 U.S. 678 (1946).

42 U.S.C. § 1981 does not apply to sex discrimination. It deals with persons who are denied rights afforded to "white citizens." See *League of Academic Women v. Regents of*

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[26] An agency relationship, in another context, has been imputed between International and Local Unions when the Local's membership is controlled by the International. *Allen v. International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada*, 338 F.2d 309 (5 Cir. 1964).

University of California, 343 F. Supp. 636, 638 (N.D. Cal. 1972), 42 U.S.C. § 2000(d) in terms bars discrimination, but not on the basis of sex, see *Joy v. Daniels*, 479 F.2d 1236 (4 Cir. 1973).

Actions alleging sex discrimination where *state* action is concerned may be brought under 42 U.S.C. § 1983. *Brenden v. Independent School District 742*, 342 F. Supp. 1224 (D. Minn. 1972), *aff'd.* 477 F.2d 1292 (8 Cir. 1973), but since the gravamen of the action here is against federal "government action" rather than "state action," jurisdiction may not be based on Section 1983. See *District of Columbia v. Carter*, 409 U.S. 418, 424-25 (1973).

IV

Preliminary Injunction

The defendant contends, by way of confession and avoidance, that women are allowed to become "associates," in the Jaycees; that women are involved in community action agencies which are partners in Project Mainstream; that they participate in other programs; that female beneficiaries are not discriminated against in the implementation of the grant; that there are women on the Council of Together, Inc.; and so on.

No logical reason has been offered, however, why women cannot be full Jaycee members except that the male membership would like to keep it that way. Of course, if the Jaycees are a private organization which does not partake of "government action" and does not perform public functions, that may be its prerogative.[27] The issue is whether the Fifth Amendment applies to the internal membership policies of the Jaycees because of significant Government involvement.

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[27] Subject to a possibly evolving doctrine based on tax exemption. See *McGlotten v. Connally*, 338 F. Supp. 448 (D.C. 1972); and see *Jackson v. The Statler Foundation*, —— F.2d ——, Slip Op. No. 46, Sept. Term 1973 (2 Cir. April 5, 1974); but cf. *Marker v. Shultz*, 485 F.2d 1003 (D.C. Cir. 1973).

The defendant maintains that there is not "significant Government involvement *in* the internal membership policies of the Jaycees" and that this commands dismissal of the complaint.

The plaintiff contends that the defendant is subject to constitutional limitations prohibiting discrimination and that it cannot lawfully exclude members or revoke the charters of chapters for failure to adhere to discriminatory policy solely on the basis of sex. The plaintiff relies on three factors: (1) the substantial amount of Government funds administered directly and indirectly by the Jaycees; (2) the quasi-governmental or public function of the organization; and (3) the tax-exempt status of the Jaycees.

The threshold issue is whether sex discrimination, in the absence of a constitutional amendment, may be a violation of the Fifth Amendment. The Supreme Court has decided that irrational discrimination solely on the basis of sex violates the constitutional guaranties of equal protection. *Reed v. Reed*, 404 U.S. 71 (1971); *Frontiero v. Richardson*, 411 U.S. 677 (1973). We may assume, therefore, that irrational discrimination on the basis of sex is a violation of the Fifth Amendment if it is the result of action by the Federal Government — "state action."[28]

The issue then is whether we can find in the decisions on what constitutes "state [government] action" a key that will solve our problem.

We know that the mere receipt of government funds is not enough to make the action of the grantee "state action." *Wahba v. New York University*, —— F.2d —— Slip Op. No. 353, Sept. Term 1973 (2 Cir. Feb. 11, 1974). If the State (Federal Government) is a "joint participant" in the challenged activity, that may suffice. *Burton v. Wilmington Parking Authority*, 365

[28]Though the specific action may be by the federal government rather than by a state, common usage refers to it as "state action." See *McGlotten v. Connally*, *supra*, 338 F. Supp. at 455 n.31; *Jackson v. The Statler Foundation*, *supra*, — F.2d ——, Slip Op. at 2746 n.5.

U.S. 715, 725 (1961). But the existence of a mere regulatory scheme standing alone may not be sufficient if the actor is essentially a private organization. *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972). Yet when the state moves in to regulate the challenged activity, the acts of even a private organization may become "state action." *Male v. Crossroads Associates*, 469 F.2d 616 (2 Cir. 1972).[29]

We have latterly come to recognize that cases involving *racial* discrimination are more likely to be found to involve "state action" than cases involving other claims of violation of due process or First Amendment right. See e.g. *Wahba, supra*, Slip Op. at 1702-03; *Jackson v. The Statler Foundation, supra*, —— F.2d at ——, Slip Op. at 2762.[30]

Whether the emphais on racial discrimination lies in its historic context as the "prime target of the Fourteenth Amendment", see *Coleman v. Wagner College*, 429 F.2d 1120, 1127 (2 Cir. 1970 — Friendly, J., concurring), or whether it lies in current mores of anti-discrimination is not altogether clear, at least with any degree of unanimity. I prefer to think that the latter emphasis is at least equal to the former, if only as a sign of confidence in the ethos of this generation.

If that be arguably so, should we not gladly acknowledge that sex discrimination of an arbitrary character is as repugnant as race discrimination of a similar nature? I must concede that this approach is hardly a paradigm of logic, for the essence of state

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[29]Cf. *Norwood v. Harrison*, 413 U.S. 455, 463 (1973): "That the Constitution may compel toleration of private discrimination in some circumstances does not mean that it requires state support for such discrimination."

[30]We may conclude that this is the view of the Court of Appeals for the Second Circuit since Judges Moore and Anderson concurred with Judge Friendly in *Wahba, supra*, and Judges Mansfield and Oakes joined with Judge Smith in *Jackson, supra*. No judge of the Court has written to the contrary. Judge Mulligan expressed a similar view in *Shirley v. State National Bank of Connecticut*, —— F.2d ——, Slip Op. No. 222, Sept. Term 1973 (February 14, 1974).

action viewed purely as an activity should hardly depend upon the character of its victims. Since we have accepted the illogic in the racial cases, however, we should accept it in the sex cases as well. We may, accordingly, think of sex as a suspect class not only in the test of what is discrimination but in the tilting of the scale in what constitutes state action.

I find that the congeries of factors here involved make the action of the United States Jaycees in attempting to revoke the charter of the New York City Chapter "state action" and subject to the jurisdiction of the federal courts.

It is true that one cannot point to a single action of the federal government as the inducing cause of the revocation of the plaintiff's charter. But to paraphrase the language of the Supreme Court in *Burton*, "in its [contract with U.S. Jaycees] the [Government] could have affirmatively required [the Jaycees] to discharge the responsibilities under the [Fifth] Amendment imposed upon the private enterprise as a consequence of state participation. But no State [federal government] may effectively abdicate its responsibilities by either ignoring them or by merely failing to discharge them whatever the motive may be." 365 U.S. at 725.

I think here the federal government "has so far insinuated itself into a position of interdependence with [National] that it must be recognized as a joint participant in the challenged activity, which on that account, cannot be considered to have been so 'purely private' as to fall without the scope of the Fourteenth [Fifth] Amendment." *Id.*

"Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance." *Burton, supra*, 365 U.S. at 722.

"[T]he framework of the peculiar facts or circumstances present", 365 U.S. at 726, are:

The Jaycees have changed in recent years from an organization largely devoted to advancement of the personal

interest of its members in the business world to an organization largely devoted to good deeds. The U.S. Jaycees' literature emphasizes the role of the local chapters like the plaintiff in these projects. Many of these good deeds are the kinds of activity generally thought of as public functions. A simple recitation makes that evident: control of alcohol abuse, control of venereal disease, economic development, housing and recreation and criminal rehabilitation. In all these areas the Government has admitted civic organizations to partnership in implementing goals set by Congress. The function remains essentially public. The chapters participate in that function, as the literature of National attests.[31]

The funding for these particular public activities is largely governmental. The organization which receives the funds (National or Foundation) is subject to control by an Advisory Council on which sit representatives of four departments of the National Government. "... even indirect governmental participation in the management of an organization is persuasive evidence of the existence of state action where that participation is both substantial and other than neutral." *Jackson v. The Statler Foundation, supra*, Slip Op. at 2761.

Whether the federal funds are awarded by contract or grant, the federal government can and has imposed conditions on the grantee. Thus the O.E.O. grant has a condition prohibiting sex discrimination.[32] On the reasoning of *Burton*, by failing to enforce as a condition of the grant that the offending by-laws of National be nullified, the Federal Government would appear to

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[31] "Jaycee voluntary manpower and concern for his community makes this program (ex-offender rehabilitation) work." "Jaycee chapters have constructed or are in the process of constructing over a quarter of a billion dollars in non-profit housing." "Your chapter may develop ... project ideas." "Each chapter should evaluate the needs of the young people in its community, then develop programs around those needs" etc. etc. (Ex. C Warfield Affd. Outlining Funding).

[32] Roper Tr. 65

the public to have approved discrimination based on sex in connection with the very activities funded in aid of the public function. "Encouragement of discrimination through the appearance of governmental approval may also be sufficient involvement to violate the Constitution." *McGlotten v. Connally, supra*, 333 F. Supp. at 458.[33]

The tax-exempt feature is only one other element to be considered. It is unnecessary, in view of the other elements that have led to the conclusion that "state action" is involved to rely upon the remand in *Jackson v. The Statler Foundation, supra*, as precedent for this decision.[34]

The testimony and exhibits establish the likelihood of irreparable injury to Local should the revocation be permitted to become effective. In addition to the obvious loss of prestige by loss of affiliation, it also appears likely that there will be loss of funds for Local to carry out both its internal leadership and management programs, and its community oriented programs.[35]

I find that the plaintiff has met its heavy burden of demonstrating a combination of probable success and possibility

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[33]The "symbolic tie with the state" need not be a sheriff's badge or a public building. *Powe v. Miles*, 407 F.2d 73 at 83 (2 Cir. 1968). The general public knows that the government uses the Jaycees to do some of its work and that they do not permit women to become members.

[34]The defendant cites a recent opinion of the Court of Appeals of the Tenth Circuit, *Junior Chamber of Commerce of Rochester, New York, et al v. The United States Jaycees*, —— F.2d ——, Slip Op. No. 73-1560 in support of its position. In that case the claim was based largely on the tax-exempt status of the defendant, United States Jaycees. The plaintiffs sought injunctions against government officials to prevent the making of grants for the use of the deprived and needy and to void the tax-exempt status of the United States Jaycees. Here the only relief sought is an injunction against the revocation of plaintiff's charter. To the extent that the opinion may be said to be a ruling on "state action," however, I note that the facts in that record are not clearly set forth. Moreover, if the record in the District Court in Oklahoma is substantially the same as that in this Court, then I must respectfully disagree with that part of the opinion.

[35]Warfield Tr. 9-12; Washington Tr. 37, 40; Roper Tr. 66-67

of irreparable injury. The balance of hardships also tips in its favor. *Stark v. New York Stock Exchange, Inc.*, 466 F.2d 743, 744 (2 Cir. 1972).

The foregoing shall constitute findings of fact and conclusions of law pursuant to Fed. R. Civ. P. 52(a).

The motion to quash is denied. The motion for a preliminary injunction is granted.

It is so ordered.

June 13, 1974

GURFEIN
U.S.D.J.

No. 73-2025 & No. 73-2028

FILED
SEP 9 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-2025

JUNIOR CHAMBER OF COMMERCE OF ROCHESTER, INC.; JANIS GAINES, individually, and on behalf of all other persons similarly situated; JANE SELMAN, individually, and on behalf of all other persons similarly situated; CHARLES WETMORE, individually, and on behalf of all other persons similarly situated; JAMES T. BRUEN, individually, and on behalf of all other persons similarly situated; DAVID HEILIGMAN, individually, and on behalf of all other persons similarly situated; THOMAS BANASZEWSKI, individually, and on behalf of all other persons similarly situated; JOANN CLEVENGER, individually, and on behalf of all other persons similarly situated; SYDNEE SCHWARTZ, individually, and on behalf of all other persons similarly situated,

Petitioners.

v.

THE UNITED STATES JAYCEES; THE NEW YORK STATE JAYCEES; THE UNITED STATES JAYCEES FOUNDATION; THE JAYCEE MENTAL HEALTH AND MENTAL RETARDATION FUND; THE JAYCEES WAR MEMORIAL FUND; GEORGE P. SHULTZ, as Secretary of the Treasury of the United States; DON ALEXANDER, as Commissioner of the Internal Revenue; THE INTERNAL REVENUE SERVICE OF THE DEPARTMENT OF THE TREASURY OF THE UNITED STATES; HOWARD PHILLIPS, Acting Director of the Office of Economic Opportunity; JAMES LYNN, as Secretary of the Department of Housing and Urban Development; PETER J. BRENNAN, as Secretary of the Department of Labor; WILLIAM D. RUCKELSHAUS, as Administrator of the Environmental Protection Agency,

Respondents.

(Over)

WILSON - EPES PRINTING CO., INC. - RE 7-6002 - WASHINGTON, D. C. 20001

No. 73-2028

THE JUNIOR CHAMBER OF COMMERCE OF PHILADELPHIA, PA.; THOMAS S. RITTENHOUSE; BEVERLY LYNN BENSON; MARGARET M. HIPPLE; ROBERTA M. SCHNEIDER,

Petitioners,

v.

THE UNITED STATES JAYCEES; THE UNITED STATES JAYCEES FOUNDATION; THE JAYCEE MENTAL HEALTH AND MENTAL RETARDATION FUND; THE JAYCEES WAR MEMORIAL FUND; GEORGE P. SCHULTZ, as Secretary of the Treasury of the United States; DON ALEXANDER, as Commissioner of Internal Revenue; HOWARD PHILLIPS, Acting Director of the Office of Economic Opportunity; JAMES LYNN, as Secretary of the Department of Housing and Urban Development; PETER J. BRENNAN, as Secretary of the Department of Labor; WILLIAM D. RUCKELSHAUS, as Administrator of the Environmental Protection Agency,

Respondents.

BRIEF IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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IN THE

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OCTOBER TERM, 1974

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Respondents.

BRIEF IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

OPINION BELOW, JURISDICTION, AND CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Petitions of the Junior Chambers of Commerce of Philadelphia and Rochester, and of the individual members of those organizations, set out the opinion below, the jurisdiction of this Court, and the constitutional and statutory provisions involved. (Rochester Petition 2-3; Philadelphia Petition 2.)

QUESTION PRESENTED

Whether the District Court and Court of Appeals erred in holding that the internal membership policies of a private organization, the Jaycees, formulated and enforced free of any government involvement, are not subject to the equal protection constraints of the fifth amendment upon mere receipt by that organization of federal tax benefits, grants and contracts?

COUNTERSTATEMENT OF THE CASE

A. Procedural History

On October 12, 1972, petitioners brought suit in the United States District Court for the District of Columbia against the United States Jaycees ("Jaycees"), the New York State Jaycees, the United States Jaycees Foundation ("Foundation"), the Jaycees Mental Health and Mental Retardation Fund, the Jaycees War Memorial Fund, and several federal officers and agencies. Petitioners' complaint challenged the Jaycees' policy, contained in its constitution and by-laws, of limiting membership to males. It sought a declaration that the Jaycees' membership policy violates the Constitution, an injunction requiring the Jaycees to restore the Rochester

chapter to membership, compensatory and punitive damages, attorneys' fees and court costs. With respect to the government parties, the suit asked for injunctive relief requiring the rescission of any tax exemptions, federal contracts or grants presently enjoyed by any organization which limits membership to males, including the Jaycees parties, and prohibiting any future tax exemptions, grants or contracts for such organizations. The convening of a three-judge court was also requested.

On February 7, 1973, pursuant to a directive of the United States Court of Appeals for the District of Columbia Circuit, the United States District Court for the District of Columbia transferred the case to the Northern District of Oklahoma. On April 9, 1973, the Jaycees parties answered the complaint, and on April 12, 1973, the government parties filed a motion to dismiss.

The United States District Court for the Northern District of Oklahoma, on May 4, 1973, ordered an evidentiary hearing for June 13, 1973, to consider the motion to dismiss, the convening of a three-judge court, the maintenance of the suit as a class action and other specified issues.[1] At that hearing petitioners presented oral testimony and introduced approximately one thousand pages of documentary evidence. The court heard argument from all parties.

On June 26, 1973, the district court filed its opinion dismissing the complaints of the original and interven-

[1] On May 24, 1973, twenty days after the hearing had been scheduled for June 13, 1973, and eight months after initiating this litigation, petitioners filed their first discovery requests and asked that the time for response be shortened in light of the scheduled hearing date. Over the objections of the Jaycees parties, the request to shorten the time was granted.

ing plaintiffs.[2] Petitioners then appealed to the United States Court of Appeals for the Tenth Circuit. On April 16, 1974, the Tenth Circuit affirmed the decision and order of the District Court.

B. Statement of Facts

The material facts are simple and undisputed:

1. The Jaycees respondents are civic organizations which are exempt from income taxation pursuant to Section 501(c)(4) of the Internal Revenue Code. The autonomously functioning Foundation is exempt from federal taxation by reason of Section 501(c)(3) of the Internal Revenue Code.

2. The Jaycees holds grants and contracts from agencies of the federal government which provide funds specifically earmarked for defined projects and expressly limit the use of the funds to such projects.

3. The Jaycees limits membership to males.

4. The affiliation of the Rochester and Philadelphia chapters was terminated because each determined that it would not abide by the Jaycees' policy of limiting membership to males.

5. The government does not dictate, influence or review the internal membership policies of the Jaycees.

6. There is no discrimination on the basis of sex or any other characteristic among beneficiaries of the projects funded by the government.

C. Decisions of the District Court and Court of Appeals

These facts were before the district court and the Tenth Circuit when each held that the necessary connec-

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[2] In July 1972 the Philadelphia Junior Chamber of Commerce admitted women to its organization. After notice from the Jaycees that it was in jeopardy of being expelled, the Philadelphia chapter and several of its members sought and received permission to be added as plaintiffs to this action.

tion between the federal funds and the internal membership policies of the Jaycees had not been established and, accordingly, that the state action doctrine was inapplicable to petitioners' allegations. Both courts specifically held that petitioners had failed to allege or prove any government involvement in the internal workings of the Jaycees, including the organization's membership policies, or any discrimination by the Jaycees in the distribution of federal funds among beneficiaries of the programs.

In affirming the district court's dismissal of the complaint, the Court of Appeals stated:

> We fail to see that there is present the essential state action . . . . The plaintiffs would have us rule that because the Jaycees are *used* by the state government to dispense funds on its behalf that all their conduct automatically becomes state action subject to a § 1983 suit regardless of whether there exists discrimination by the private entity in the dispensing of the funds. In effect, then, plaintiffs say that the state must, consistent with the Constitution, refrain from dealing with discriminators regardless of whether the discrimination is related to the alleged state action. We disagree. (Rochester Petition A-8; Philadelphia Petition 9a.)

The court concluded that:

> The membership policy against which the attack has been leveled has no connection with the state activity of the United States Jaycees. Neither the complaint nor the record establishes or promises to establish the kind of state involvement essential to a civil rights action under § 1983. (Rochester Petition A-9; Philadelphia Petition 10a.)

In analyzing petitioners' allegations of federal involvement, through tax benefits, grants and contracts, in the internal membership policies of the Jaycees, the appellate

court concluded that a causal connection did not exist between the internal activities of the Jaycees and the government which would require the application of constitutional standards to otherwise private conduct.

> . . .[T]he question is whether the United States is obligated to see to it that the United States Jaycees' conduct shall be exemplary quite apart from its administering of programs and governmental funds. No case has been cited which extends to this length. On the contrary, the criteria announced by the Supreme Court have tended to require that the alleged unconstitutional conduct relate specifically to governmental action. (Rochester Petition A-11-A-12; Philadelphia Petition 12a.)

REASON FOR DENYING THE WRIT

This case does not present a novel construction of the fifth amendment. Petitioners merely seek to have this Court review the Tenth Circuit's affirmance of the district court's determination that the *facts* alleged and proved by petitioners are insufficient to establish a causal link between the complained of private activity and the government. Review of that essentially factual determination, absent a substantial federal question as to the applicable law, is inappropriate for certiorari.

The district court reviewed petitioners' extensive evidence in considering whether a nexus existed between the federal contracts, grants and tax benefits and the challenged Jaycees' membership policies. On the basis of the record before it, the district court properly concluded that such a connection had neither been alleged nor proved. The Tenth Circuit affirmed that decision.

The decision of the Court of Appeals is in full accord with the decisions of this Court. *Moose Lodge No. 107* v.

Irvis, 407 U.S. 163 (1972);[3] *Walz* v. *Tax Commission of City of New York*, 397 U.S. 664 (1970).[4] The Court of Appeals correctly concluded that petitioners had failed to state a claim under 42 U.S.C. § 1983 or the Constitution.

Restrictive membership policies in private associations, even where such policies are drawn with reference to race, are not subject to constitutional strictures unless a "nexus" exists between those restrictive policies and substantial government involvement. *Irvis*, *supra*.[5] This is not a case in which property of the government, or property dedicated or committed to a public use, is employed to promote a plan of invidious discrimination. *See Gilmore* v. *City of Montgomery*, 42 U.S.L.W. 4920 (U.S. June 17, 1974); *Norwood* v. *Harrison*, 413 U.S. 455 (1973); *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715 (1961). The Jaycees is merely a conduit for federal funds. Here petitioners do not allege that intended beneficiaries of the projects funded by the government are discriminated against. Rather, petitioners'

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[3] In *Irvis* this Court held that the goevrnment must be "significantly involved itself with invidious discriminations" before there is a constitutional violation. 407 U.S. at 173.

[4] In *Walz* this Court stated:

> The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state. No one has ever suggested that tax exemption has converted libraries, art galleries, or hospitals into arms of the state or put employees "on the public payroll." 397 U.S. at 675.

[5] Without a "nexus" requirement the "essential dichotomy" between private and government action would have no meaning. *See* Civil Rights Cases, 109 U.S. 3 (1883). Moreover, if private organizations in receipt of public funds were required to remake their internal organization in the image of society generally they would be discouraged from participating in publicly useful activities. *See* Wahba v. New York University and Severo, 492 F.2d 96, 102 (2d Cir. 1974).

complaint is that an organization which channels the benefits of these projects to other community organizations and agencies restricts its membership to men. There is no allegation that the government is involved in the Jaycees' internal membership policies. Indeed, the facts before the Court of Appeals and the district court make clear that the government plays no "part in establishing or enforcing the membership . . . policies" of the Jaycees. *Irvis, supra,* at 175.

Moreover, the decision of the Tenth Circuit is fully consistent with the decisions of that Circuit, *Ward* v. *St. Anthony's Hospital,* 476 F.2d 671 (10th Cir. 1973); *Browns* v. *Mitchell,* 409 F.2d 593 (10th Cir. 1969), as well as the decisions of other circuits, *e.g., Fletcher* v. *Rhode Island Hospital Trust & National Bank,* 496 F.2d 927 (1st Cir. 1974); *Jackson* v. *Statler Foundation,* 496 F.2d 623 (2d Cir. 1974), which have held that only where the government involvement has a significant and specific connection with the allegedly unconstitutional conduct under attack will the requisite degree of state involvement be established requiring the invocation of constitutional standards. Where, as here, no such causal relationship has been or can be established, the internal policies of a private organization are immune from constitutional scrutiny. *E.g., Irvis, supra; Fletcher, supra; Jackson, supra; Ward, supra; Browns, supra.*[6]

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[6] While this appeal was pending in the Tenth Circuit, the New York City Jaycees, Inc. brought a similar suit against the United States Jaycees in the District Court for the Southern District of New York. The New York City Jaycees, Inc. v. United States Jaycees, Inc., No. 74 Civ. 652 (June 3, 1974). An appeal from the decision of the district court in that case was noted by the defendants therein on June 28, 1974. The decision of the District Court for the Southern District of New York is in direct conflict with decisions of its own court of appeals. Jackson v. Statler Foundation, 496 F.2d 623 (2d Cir. 1974); Grafton v. Brooklyn Law School, 478 F.2d 1137 (2d Cir. 1973); Powe v. Miles, 407 F.2d 73, 81 (2d Cir. 1968). *Cf.* Barrett v. United Hospital, No. 73 Civ. 1716 (S.D.N.Y., May 23, 1974); Mulvihill v. Julva Butterfield Memorial Hospital, 329 F.Supp. 1020 (S.D.N.Y. 1971); Gross-

CONCLUSION

The decision of the Tenth Circuit does not give rise to a substantial question regarding the parameters of the fifth amendment. The decision addresses a factual determination of whether petitioners' allegations and proof of a causal relationship between the government and the internal membership policies of the Jaycees were sufficient to mandate adherence to constitutional requirements. Having reviewed the record developed by petitioners in light of its own decisions and those of this Court, the Tenth Circuit concluded that the allegations before it were insufficient to establish such a nexus. That decision is fully in accord with the opinions of this Court and of other circuits.

Accordingly, the Jaycees respondents submit that the decision of the Tenth Circuit is correct and that the Petitions of the Junior Chambers of Commerce of Rochester and Philadelphia should be denied.

Respectfully submitted,

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---

ner v. Trustees of Columbia University, 287 F.Supp. 535, 547-48 (S.D.N.Y. 1968). A conflict of a district court decision with decisions of its own or other courts of appeal is not, however, despite petitioners' veiled suggestion to the contrary, a basis for granting a writ of certiorari.

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-2025

JUNIOR CHAMBER OF COMMERCE OF ROCHESTER, INC., ET AL., PETITIONERS

v.

THE UNITED STATES JAYCEES, ET AL.

No. 73-2028

JUNIOR CHAMBER OF COMMERCE OF PHILADELPHIA, PA., ET AL., PETITIONERS

v.

THE UNITED STATES JAYCEES, ET AL.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

Petitioners brought this action against the United States Jaycees, certain state and local Jaycee organizations and foundations,[1] and seven federal

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[1]In addition to the United States Jaycees, the private defendants include the New York State Jaycees, the Pennsylvania State Jaycees, the Louisiana Junior Chamber of Commerce, Inc., the Downtown Chapter of the District of Columbia Jaycees, Maine State Jaycees, Junior Chamber of Commerce of Orrington, Inc., the United States Jaycees Foundation, the Jaycees Mental Health and Mental Retardation Fund and the Jaycees War Memorial Fund.

officials and agenices.[2] They alleged that the Jaycees' exclusion of women from membership constituted unconstitutional sex discrimination by state action, on the ground that the Jaycees are closely related to government regulation and funding. More particularly, petitioners contended that by granting tax exempt status to the Jaycee organizations (and their associated foundations), the Secretary of the Treasury, the Commissioner of Internal Revenue, and the Internal Revenue Service have endorsed and subsidized the Jaycees' discriminatory membership policy. Petitioners assert similar arguments against the Secretary of Labor, the Secretary of Housing and Urban Development, the Administrator of the Environmental Protection Agency, and the Director of the Office of Economic Opportunity, who have allowed the Jaycees to participate in the administration of various federally-funded programs.

Petitioners sought injunctive relief to require the termination of tax-exempt status of any organization whose membership discriminates on the basis of sex and the termination of any federal grants or programs which are administered through sex-segregated organizations. The district court granted the government's motion to

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[2]The federal defendants are the Secretary of the Treasury, the Internal Revenue Service, the Commissioner of Internal Revenue, the Secretary of Housing and Urban Development, the Secretary of Labor, the Director of the Office of Economic Opportunity and the Administrator of the Environmental Protection Agency.

dismiss,[3] and the court of appeals affirmed. While the court of appeals indicated that federal jurisdiction was questionable (Pet. No. 73-2025, p. A-7), its affirmance was based upon its determination that the discrimination complained of did not involve state or federal action (Pet. No. 73-2025, pp. A-8 to A-12).

1. The decision below that the challenged discrimination did not constitute state action accords with *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163. There, the Court stated (p. 173) that "where the impetus for the discrimination is private, the State must have 'significantly involved itself with invidious discriminations' * * * in order for the discriminatory action to fall within the ambit of the constitutional prohibition." Here, as the court of appeals concluded (Pet. No. 73-2028, pp. 10a-12a), there is no significant government involvement with the Jaycees membership policy.

The United States Jaycees ("Jaycees") is a nonprofit, civic-oriented organization, with affiliated state and local chapters. They are exempt from federal income taxation as "civic organizations" under Section 501(c)(4) of the Internal Revenue Code of 1954, while the three private foundations established by the Jaycees, which were joined as defendants, are exempt as charitable organizations under Section 501(c)(3). This federal tax-exempt status does not, standing alone, constitute significant government involvement in the Jaycees' exclusionary membership policy within the meaning of the *Moose Lodge* case. Indeed, as the Court observed in *Walz* v. *Tax Commission*, 397 U.S. 664, 675-676, a tax exemption does not constitute government "sponsorship" but rather creates

[3]The government had moved to dismiss on the grounds that (1) the suit was barred by sovereign immunity, and (2) the complaint failed to state a claim upon which relief might be granted. In sustaining the government's motion to dismiss, the district court did not indicate whether it was relying on the jurisdictional ground raised by the government or the failure to state a claim. With respect to the private defendants, however, it expressly dismissed for failure to state a claim (Pet. No. 73-2025, pp. B-3 to B-4).

"only a minimal and remote involvement." Accord: *Marker* v. *Shultz*, 485 F. 2d 1003 (C.A.D.C.); *Browns* v. *Mitchell*, 409 F. 2d 593 (C.A. 10); *Bright* v. *Isenbarger*, 314 F. Supp. 1382 (N.D. Ind.), affirmed, 445 F. 2d 412 (C.A. 7); *Blackburn* v. *Fisk University*, 443 F. 2d 121 (C.A. 6); *McCoy* v. *Shultz*, 31 A.F.T.R. 2d 858 (D.D.C., decided February 13, 1973).[4]

Similarly, the Jaycees' participation in the administration of various federal grants and public assistance programs[5] does not rise to the level of governmental involvement in the exclusionary membership policy attacked by petitioners. With respect to such federal grants or contracts, the Jaycees act only as a conduit through which the federal programs are implemented on a local level. In contrast to the textbook grant to racially-segregated schools struck down in *Norwood* v. *Harrison*, 413 U.S. 455, and the racially-discriminatory policy of a restaurant located in a publicly-owned building held unconstitutional in *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, the federal grants here do not benefit the Jaycees but on the ultimate recipients of the funds.

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[4]In *Green* v. *Connally*, 330 F. Supp. 1150 (D.D.C.), affirmed *sub nom. Coit* v. *Green*, 404 U.S. 997, the Section 501(c)(3) exemption of segregated private schools was successfully challenged. However, *Green* was not decided on "state action" grounds but on the basis of the meaning of the term "charitable" as used in Sections 170(c) and 501(c)(3) of the Code.

[5]For example, petitioners refer (Pet. No. 73-2025, pp. 7-8; Pet. No. 73-2028, p. 3) to grants and contracts awarded the Jaycees by the Department of Health, Education, and Welfare, the Office of Economic Opportunity, the Department of Housing and Urban Development and the Department of Labor. The programs funded by such grants include such diverse civic-oriented activities as counseling Job Corps returnees, criminal justice programs, construction of low-cost housing projects, and public education on such subjects as alcohol abuse, venereal disease, danger of poisons, child abuse, etc.

With one exception,[6] petitioners do not allege that there is any discrimination with respect to the actual administration of these federally-funded programs, insofar as recipients or beneficiaries are concerned. Rather, they urge only that women have been deprived of the leadership training and experience involved in participating with the Jaycees in the administration of such programs.

Contrary to petitioners' argument (Pet. No. 73-2025, pp. 21-22; Pet. No. 73-2028, p. 12), the decision below does not conflict with *Jackson* v. *Statler Foundation*, 496 F. 2d 623 (C.A. 2), as to the federal respondents. *Jackson* held only that the plaintiff had standing to challenge state (and federal) tax exemptions of 13 charitable foundations because of alleged racially-discriminatory policies—a question the decision below did not discuss in dismissing petitioners' suit against the federal respondents. Compare *Cattle Feeders Tax Committee* v. *Shultz*, No. 73-1896 (C.A. 10, decided October 4, 1974), with *Eastern Kentucky Welfare Rights Organization* v. *Simon*, No. 74-1293 (C.A. D.C., decided October 9, 1974). Insofar as the compiaint in *Jackson* sought revocation of tax exemptions, the court held that it was deficient on its face for failure to make the New York State Tax Commission and the Secretary of the Treasury parties. The case was remanded for further proceedings to determine whether, under various criteria suggested in the majority opinion, the foundations' affairs were so closely linked to governmental action and support as to

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[6]Petitioners suggest (Pet. No. 73-2025, p. 8) that under the Job Corps program funded by the Department of Labor, the Jaycees counsel only male Job Corps returnees. The record shows, however, that the Job Corps program is designed to assist severely disadvantaged youth of both sexes. While the Jaycee volunteers are asked to assist males, a similar agency called WICS (Women in Community Service) assists the females (Ex. 274).

generate "state action" in their conduct (496 F. 2d at 629).[7] As the majority opinion in *Jackson* noted, its suggested "formulation of [a] definition of 'state action' is applicable only to claims of racial discrimination" (496 F. 2d at 635). At all events, however, there is no reason to believe that the court below applied substantially different criteria here, or that the application of those criteria would lead to a different result in this case.

2. The dismissal of petitioners' action against the federal respondents can also be supported on the alternative ground that petitioners lacked standing to sue these governmental officers and agencies. As this Court has recently reaffirmed, the doctrine of standing requires that the complaining party suffer a concrete injury caused by the action challenged as unlawful. See, *e.g., Schlesinger* v. *Reservists Committee to Stop the War,* No. 72-1188, decided June 25, 1974; *Laird* v. *Tatum,* 408 U.S. 1, 12; *Data Processing Service* v. *Camp,* 397 U.S. 150. While standing may exist where injury and causative action are only tenuously linked (see *United States* v. *SCRAP,* 412 U.S. 669, 686-690), there is no showing that the Jaycees' tax-exempt status and their administration of various federal programs caused or in any manner reinforced their "males only" membership policy, which the petitioners assert has

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[7]Judge Friendly, joined by Judges Hays and Mulligan, filed an extensive opinion dissenting from the court's denial of a motion for reconsideration *en banc.* That opinion emphasized the distinction between seeking relief against governmental involvement and relief against the foundations themselves. Judge Feinberg also dissented.

injured them. Indeed, the relief sought by petitioners against the federal respondents would not necessarily result in the admission of women to the Jaycees.

Those petitioners who are taxpayers also lacked standing to sue as such, since they failed to establish the required "logical nexus between the [taxpayer] status asserted and the claim sought to be adjudicated." *Flast* v. *Cohen*, 392 U.S. 83, 102; *Schlesinger* v. *Reservists Committee to Stop the War*, *supra*; *United States* v. *Richardson*, No. 72-885, decided June 25, 1974. Petitioners' challenge was not addressed to the taxing and spending power of Article I, Section 8 of the Constitution and petitioners have made no claim with respect to the federal grants that the funds were being spent in violation of a "specific constitutional limitation upon the * * * taxing and spending power * * * " (392 U.S. at 104). Moreover, the real purpose of their suit is not to reduce federal expenditures or increase revenues, but to change the Jaycee membership policies.

Finally, to the extent that petitioners sought injunctive and declaratory relief against the Secretary of the Treasury, the Commissioner of Internal Revenue, and the Internal Revenue Service concerning the tax-exempt status of the Jaycee organizations, the suit is barred by the Anti-Injunction Act (Section 7421 of the Internal Revenue Code) and the tax exception to the Declaratory Judgment Act (28 U.S.C. 2201). Those two provisions respectively prohibit suits "for the purpose of restraining the assessment or collection of any tax" or declaratory suits "with respect to Federal taxes." Compare *Bob Jones University* v. *Simon*, No. 72-1470 and *Alexander* v. *"Americans United" Inc.*, No. 72-1371, both decided May 15, 1974.

For the reasons stated, the petitions for writs of certiorari should be denied with respect to the federal respondents.

Respectfully submitted.

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